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FOREWORD

WHEN THE ARBITRATION JOURNAL was founded three years ago, it was with the idea that it would collate arbitration news from all over the world and would bring together the best thought and practice upon the subject for guidance in the understanding and future development of all phases of arbitration. For this purpose distinguished collaborators were appointed in different countries.

The trend of events in world history has been such as to make this ideal impossible of realization. Today some of the collaborators of the JOURNAL are men without a country; others are no longer free to communicate their views. Arbitration has practically disappeared from all continents except the western one, or is being used in name, but with the force of arms as its "amicable" method of securing compliance.

On the other hand, arbitration has grown apace in the western world, not only in commercial and industrial relations, but in inter-American trade. The news from these sources is increasingly heavy and important, and indicates developments and action unprecedented in arbitration's history.

In inter-American affairs, for example, we find a steady growth in the use of the facilities of the Inter-American Commercial Arbitration Commission to settle differences between business men of the Americas and to remove friction in trade relations, and a corresponding growth in the promulgation of new laws in the American Republics to give this practice validity.

In the United States, arbitration is taking an important rôle in our National Defense Program, in which it is acting to rid trade channels of disputes and to keep goods moving without interruption, and it has received the stamp of approval of the United States Government as evidenced by arbitration provisions appearing in War Order Forms.

In a new field, arbitration has been accepted by the U. S. Department of Justice, which has recently settled its anti-trust suit against a group of motion picture distributors after agreement upon a Consent Decree, in which a system of arbitration, administered by the American Arbitration Asscociation and to be op-

erated in thirty-two cities, is a part of the machinery for the self-regulation of the industry set up by the Decree.

And we find that the collective bargaining agreement between management and men which does not provide for some form of machinery for the adjustment of grievances and the arbitration of disputes is becoming a rarity.

In its first issue of the New Year, the ARBITRATION JOURNAL will enlarge its issue to accommodate this new thought and material; it will simplify its presentation, and it will place more emphasis upon the development of arbitration thought and practice and its influence upon the world today.

It will also take cognizance of arbitration as an important element in national defense of the Western Hemisphere and the adjacent islands.

COMMERCIAL ARBITRATION

PIONEERS IN AMERICAN ARBITRATION *

BY

FRED I. KENT †

A RECORD of the pioneers in arbitration in the United States must, like "all Gaul", be divided into three parts if it is to give a real picture of arbitration's development in this country.

There were, first, the trail-blazers of the ox-cart period, who advanced the outposts of arbitration as they penetrated into unknown parts of the new world.

Then came the vanguard of the great trade associations, who set up arbitration machinery and encouraged their members to use it, thus carrying arbitration throughout entire trade groups.

Finally, more than a century after arbitration had arrived in the new world, came the pioneers of the machine age, who set about bringing order out of a confused and unstable practice and paved the way for the modern practice of arbitration as we know it today.

EARLY YEARS

When our colonial forefathers landed at Plymouth Rock and unloaded their meager possessions, they brought with them, to transplant in America, many of their English traditions and institutions. Among these were English common law and its fellow-traveler, arbitration. As their descendants, in later generations, spread to the far corners of the new country, arbitration followed new trails and was established in new communities.

It is not surprising that, at first, attention was given to arbitration as an adjunct of the courts. As early as 1644, the General Court of the Colony of Connecticut advocated the settling of controversies by this means. The New Haven Town Records of

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1649-1662 contain records of how, in 1651, the court ordered one Mr. Goodanhouse and his farmer to arbitrate their differences as to whether the farmer was over-selling Mr. Goodanhouse's hay and under-feeding his cattle. In 1652, two neighbors, Mr. Judson and Mr. Caffinch, appearing before the court, were ordered to "referre all differences and questions concerning matters of damage betwixt them . . . . for damage in corne by Mr. Caffinch fenc and hoggs" to arbitration, and to "stand to" the arbitrators' award. References to other similar cases appear in the Records.

In 1663, Connecticut and Rhode Island arbitrated a boundary dispute, naming five arbitrators, and in 1667, when differences between New Haven and Milford arose over a similar question, three men were appointed by the court to present their findings to the General Assembly.

In 1753, the first arbitration statute in Connecticut was passed. By 1794, the New Haven Chamber of Commerce had a standing committee on arbitration, headed by Joseph Drake, and arbitration has been used by the Chamber ever since.

But more than 25 years earlier, the practice of arbitration was instituted in New York, by what is now the Chamber of Commerce of the State of New York. On May 3, 1768, the first committee ever to be appointed in this country for the settlement of commercial disputes outside of the courts was named by the President of the Chamber, thus establishing the oldest arbitration tribunal in the United States.

Six gentlemen, said the President, were to "attend on every Tuesday, or oftener, if business require, at such places as they may agree upon". That first Arbitration Committee of which there is record was composed of: James Jauncey, Jacob Walton, Robert Murray, Samuel Ver Plank, Miles Sherbrooke and Theopy. Bache. Many years later the name Bache also appears among the modern pioneers, of whom more will be told later.

This committee was replaced by similar groups month after month. Not long ago there was discovered in the New York Public Library an original manuscript volume containing the minutes of the Arbitration Committee for the years 1779-1792.

Other records of other pioneers in arbitration about this period also exist. The most famous was George Washington, of whom we might add "First in Arbitration" to his many other "firsts".

When he made his last Will and Testament, Washington included in it the following provision:

> ". . . . my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two,—which three men thus chosen shall, unfettered by law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes, to be as binding on the Parties as if it had been given in the Supreme Court of the United States."

In early days, it seems, good faith and public opinion were enough to make men honor their obligations to arbitrate and to accept the decisions. But as courts developed and commerce expanded and the written contract came to govern commercial society, merchants did not know each other nor reside in the same town, and arbitral obligations were frequently evaded. Naturally, men turned to the courts and to the law for help in making arbitrations final and binding.

Thus, in 1861, under the leadership of James de Peyster Ogden, the New York State Legislature passed a law which made the decisions of the New York Chamber's Arbitration Committee binding and established them as bases for Judgment in a Court of Record.

VANGUARD OF TRADE GROUPS

In the meantime, however, the use of arbitration was spreading from chambers of commerce to trade groups, for as business grew and expanded and business men began to band themselves into trade associations, arbitration was taken on as a definite function of these groups. This was increasingly true as new laws were passed, giving some semblance of a legal foundation to the practice of commercial arbitration, and as trade associations became sufficiently powerful to enforce observance of arbitration agreements and awards through trade discipline. The practice offered to business a method of self-regulation, particularly in the field of trade practices where an alleged violation by a member of the trade was better adjudicated under this amicable method than in the courts, and arbitration began to take form under well-established rules.

One of the first of such groups was the New York Stock Exchange, which grew out of an association founded in 1792. As early as 1817 its constitution provided that "all questions of dispute in the purchase and sale of stocks shall be decided by a majority of the Board". It was not until February, 1863, however, that a regular standing Committee on Arbitration came into existence. Whether this was due to a more urgent need for such a Committee because of conditions attendant upon the Civil War is not apparent from the records, but such may well have been the case, since war conditions and their aftermath of upset trade almost invariably produce a rise in the number of disputes. The Exchange has retained its pioneering spirit, constantly seeking to improve its machinery. Recently it has opened its panel of arbitrators to non-members, in order to provide parties who are not members of the Exchange with neutral arbitrators, and extended its facilities to other cities throughout the United States.

Another important trade group that pioneered in arbitration in the days when the traveling was difficult and many obstacles were encountered by the trail-blazers was the silk industry. The trade was in its infancy when, in 1872, the Silk Association of America was organized, one of whose invaluable contributions to the industry was the establishment of arbitration machinery in 1898. Its first case was decided on October 27, 1900. Today the number of cases submitted exceeds 2,000.

In the long service the Silk Association (now the National Federation of Textiles, Inc.) has rendered to arbitration, the names of two men stand out—the late George L. Montgomery, founder of the Association's arbitration machinery and the first chairman of its Arbitration Committee, and A. D. Walker, a member of the Committee since 1912 and its Chairman since 1922. One of Mr. Montgomery's notable contributions to the trade was the first standard rules governing silk transactions, embodying an arbitration provision, which were adopted, after his death, in 1909. Under Mr. Walker's Chairmanship many important changes have occurred in the arbitration machinery, and he has performed valiant service in uniting the different factions of the industry to the point where arbitration is an accepted practice in all of its branches. It might be said that the Association's procedure has long served as a "guinea pig" for commercial arbitration generally, the cases decided having clarified

unexplored points in arbitration procedure and assisted in establishing desirable arbitration practices for other groups which have followed.

Another group that was early to see and understand the trend toward arbitration was the Grain and Feed Dealers' National Association. Thirty-nine years ago, when it launched its campaign to bring compulsory arbitration to the grain and feed trades, many of its members were skeptical of the results. Grain and feed dealers are great individualists and they feared that compulsion would not work in a voluntary organization. To be sure the sailing was none too smooth during the first years following the adoption of the scheme. Some members refused to arbitrate and were expelled; some declined to abide by awards made by the arbitrators and they, too, were forced out of the Association. One of these, in 1921, fought expulsion from the Association, upon his refusal to pay an arbitration award, through the highest courts of Ohio. The Association's victory in that significant litigation placed compulsory commercial arbitration on a sound footing. Now, arbitration is so firmly fixed and established in the minds of all grain and feed dealers that no one questions the right of the Association, either to compel arbitration or to publish the names of members who refuse to live up to their arbitration obligations.

The principle of compelling the arbitration of disputes arising between members of a trade group or association, by means of trade discipline, has also been followed by a number of other pioneering groups, such as the National Hay Association, organized in 1895, and the National Cottonseed Products Association, organized in 1897, whose trade rules have been so carefully developed that in recent years it has not been uncommon to go through an entire fiscal year without the Association's arbitration machinery being put into operation on a single occasion.

Space limitations prevent giving details concerning these and other of the earlier pioneering groups that established arbitration machinery in one form or another, such as the New York Cotton Exchange, New York Produce Exchange, the Boston Chamber of Commerce, the Baltimore Corn and Flour Exchange (later the Baltimore Chamber of Commerce), the American Spice Trade Association, Board of Trade of the City of Chicago, the New Orleans Board of Trade and many others.

As a part of this development of arbitration by trade associations there came the interesting growth of what we might call "arbitration combines"—that is, a plan embracing various branches of the same industry or group.

There was, for example, the National Uniform Plan of Arbitration established jointly, in 1913, by the National Wholesale Grocers' Association, the National Food Brokers' Association and the National Canners' Association; the Council of Arbitration of the Shoe and Leather Industry, set up by the National Boot & Shoe Manufacturers' Association, the National Shoe Retailers' Association, the National Association of Shoe Wholesalers of the United States and the Tanners' Council of America; the Board of Commercial Arbitration of the Federation of Graphic Arts and Allied Industries of New York City, of which C. Frank Crawford has been Chairman since its inception; and the National Arbitration Rules set up by the Tanners' Council and the National Association of Importers of Hides and Skins, in collaboration with the American Arbitration Association.

Still later this idea spread to a point where an entire field became organized under an arbitration plan, such as occurred in the amusement industry. Here the stage and screen actors, members of the chorus, variety artists, radio performers, musical artists, theatrical and motion picture producers and broadcasting companies have withdrawn their disputes from litigation and have tied their respective groups into a network of arbitration agreements. Pioneers in this field are Frank Gillmore, now President of the Associated Actors and Artists of America, under whose leadership Actors' Equity Association led the arbitration parade in 1913, and who received the American Arbitration Association's Gold Medal for distinguished service in arbitration in 1931, and Paul Turner, Equity counsel. Mrs. Emily Holt, its former associate counsel and now the Executive Secretary of the American Federation of Radio Artists, also performed yeoman service in the cause of arbitration. Chronologically, these names are misplaced, for assuredly Mrs. Holt belongs among the modern pioneers.

YEARS OF MATURITY

And now we arrive at arbitration's coming-of-age, and the modern pioneers who helped it to reach maturity. As we have

seen, Americans inherited the English common law under the old order, which depended largely upon the good faith of the parties for its effectiveness. They had to struggle along with arbitration laws that gave neither validity nor enforceability to agreements in contracts to arbitrate future disputes. England, meanwhile, had seen the light and remedied this defect in its laws, but it was not until 1920, almost a quarter of a century later, that there was passed the first modern state arbitration law which gave New York business men security in their arbitration agreements.

This development did not come suddenly. The movement may be said to have started in 1911, when a Special Committee of the New York State Chamber of Commerce was appointed to revive the lagging arbitration machinery that had lain dormant since the beginning of the century. Under the chairmanship of Charles L. Bernheimer and with the resources of the Chamber behind it, arbitration was pushed so vigorously that the New York legislature, in 1920, passed the modern arbitration law.

But that was not so easy as it sounds, for it required a great amount of effort and patience and the laying of much groundwork to secure favorable consideration of such legislation. Much of the credit for the final success of the arbitration law belongs to Julius Henry Cohen, then, as now, counsel for the Chamber. In a day when arbitration was greatly misunderstood and feared, and frequently condemned, by lawyers, it required both courage and vision for a lawyer to carry on this fight, and these qualities Mr. Cohen possesses to a high degree. A fellow-pioneer in this early campaigning was Kenneth Dayton, also a member of the New York Bar, now Director of the Budget of New York City. So successful had these three been in enlisting the Bar Association of the City of New York and trade groups to rally to their support, that their efforts were extended to a Federal Arbitration Law and were crowned with success in 1925 when that law was passed.

In the meantime, another pioneer had entered arbitration's lists. The Arbitration Society of America had been organized in 1923 by Moses H. Grossman and was enjoying the support of prominent figures in business, the Bench and the Bar. With a tribunal in operation and an ambitious program of education laid out, the Society was fulfilling Judge Grossman's dreams for its future.

But still another organization had appeared upon the New York scene—the Arbitration Foundation, organized by Mr. Bernheimer as an educational body, to further the practice of arbitration and to collect funds in the interests of a wider movement.

To arbitration's adherents, the duplication of effort and expense which two such organizations in the field were bound to produce threatened a lack of uniformity and an impediment to arbitration generally. A movement to merge the two bodies was undertaken by a group of prominent business men, who set about the task of reconciling the various interests of the two organizations and bringing them together. Lucius R. Eastman was Chairman of the Temporary Organizing Committee, which also included Frank H. Sommer, Anson W. Burchard, Henry Ives Cobb, John F. Fowler, James H. Post and Felix M. Warburg.

The merger was happily effected and, on January 29, 1926, the American Arbitration Association was born, with Mr. Burchard as its first President. Upon his death later in the same year, he was succeeded in that office by Mr. Eastman, to whom arbitration owes a double debt. Not only did he effectively complete the amalgamation of the existing organizations into one national body, but he has remained steadfastly at the helm and has guided the Association through many storms into a port of safety. When Mr. Eastman retired as President in 1938, to become Chairman of the Association's Board of Directors, he was succeeded by Franklin E. Parker, Jr., the first practicing lawyer ever to head the organization.

And so began, in 1926, the period of arbitration's most sturdy and scientific development in this country—a period marked by growth in arbitration laws, in arbitration machinery, in arbitration prestige and practice, in its standards, its acceptance by business of high and low degree and by the Bar, and its spread to fields hitherto untouched by its possibilities.

For with the merger completed and "full steam ahead" signalled, there entered upon the scene a figure in whom were combined the qualities of pioneer and crusader and who was to unite the scattered but potentially effective forces of arbitration into a single fighting unit under one banner, and develop American commercial arbitration on an inter-American and an international scale. Such a figure was Miss Frances Kellor, who became the Executive Vice-President of the new Association and

has occupied that office for the fourteen years the Association has progressed.

Early in its existence the Association was fortunate in securing the help of a group of far-seeing business men who were virtually its founders and without whose support it must have failed. Such supporters were many, but outstanding among them were Jules S. Bache, Anson W. Burchard, Homer A. Dunn, Samuel Fels, Michael Friedsam, Moses H. Grossman, Robert H. Montgomery, James H. Post, John D. Rockefeller, Jr., Julius Rosenwald, Charles M. Schwab, Franklin Simon and Felix M. Warburg. Many of these pioneers have since passed on, but the names of such men as Felix M. Warburg will be remembered as long as men seek the advancement of justice and the harmonizing of discord.

What this little group saw was enlightened business leaders struggling with the problems of self-regulation in their industries and the dawn of ethical codes of practice in business; they knew the burden which litigation laid upon business, for in the great industrial centers a delay of three years was not unusual in a litigation; and although arbitration had been imported from England more than a century earlier, it was such a tangle of unsound theory and haphazard practice, except in some of the trade groups, that business men generally were afraid to venture into it. If, here and there, the light of arbitration shone brightly in the dark, it was more as a beacon than as an institution of commercial peace.

And so the Association set about its tasks. There was, first, the problem of winning the confidence and cooperation of the organizations already in the field, in order that they might participate in a national plan without fear of disturbing their own; there were the problems of bringing existing facilities up to a standard; of extending facilities where none existed in a branch of trade; of formulating knowledge so that a national system could be developed along carefuly thought-out lines of experience and practice; and of securing the enactment of state arbitration laws which would give legal effect to the intention of business to establish self-regulation and commercial peace and a legal foundation upon which to build.

How these objectives have been accomplished is a story too long to be told in this article, and much of it will be related by

other contributors to this Symposium. To the long list of the pioneers whose names stand out on the pages of arbitration's history must go the credit for these accomplishments. Some of these have already been mentioned, but there are others whose contributions have been equally important. No record of arbitration's progress would be complete that did not include J. Noble Braden, who, since the establishment of the American Arbitration Association, has directed the arbitration of more than ten thousand disputes which have been brought to its tribunal; Wesley A. Sturges, who had made notable contributions to arbitration education and whose work on *Commercial Arbitrations and Awards* is the leading textbook on the subject; Dean Frank H. Sommer, of the New York University School of Law, and Dr. Nathan Isaacs, of the Harvard Graduate School of Business Administration, outstanding educators who have helped to give arbitration a place in the curriculum of our schools and universities; and Charles T. Gwynne, directing head of the Chamber of Commerce of the State of New York, whose traditions and history have been both a guide and an inspiration to the organizations that were to follow.

Their record speaks for itself, and an encouraging one it is, not only to those who blazed arbitration's trails, but to those of us who have followed them, and now find ourselves in a confused and war-torn world in which arbitration is being banished from the countries of its origin and driven to seek refuge in the United States.

Our pioneering days are not yet over. Much yet remains to be done to bring arbitration to its full stature. And ours, ultimately, may be the task of keeping arbitration alive for future generations throughout the world and through it play a leading role in establishing international peace through economic trade channels.

NOTES AND COMMENT

Arbitration under Consent Decree in the Motion Picture Industry. A Consent Decree, the terms of which were agreed upon after protracted negotiations between attorneys for the leading motion picture distributors and representatives of the United States Department of Justice, was presented to Judge Henry W. Goddard, of the U. S. District Court of New York, on Oc-

tober 29, 1940. A hearing has been scheduled for November 14, and if the Decree is approved by the Court, its signing by Judge Goddard will end the Government's anti-trust suit against the five consenting distributing companies.

The Government's suit against the eight major companies engaged in the distribution of motion pictures was filed two years ago. Trial was begun in the early summer of 1940, but was later adjourned to permit the parties to the action to attempt to negotiate a Consent Decree. Three of the defendant companies—Columbia Pictures, Inc., United Artists Corporation and Universal Pictures, Inc.—refused to join in the settlement, and the suit against them will be continued by the Government. The five assenting companies are: Loew's, Inc., Warner Brothers Pictures, Inc., R.K.O. Radio Pictures, Inc., Twentieth Century-Fox Film Corporation and Paramount Pictures, Inc.

The fair trade practices established by the Decree are enforceable through an arbitration system for the industry. As finally agreed upon by the companies and the Department of Justice, the American Arbitration Association is designated as the administrator of the arbitration system, which will operate through thirty-two tribunals, one of which will be located in each of the motion picture exchange districts. There will also be an Appeal Board of three members, appointed by the Court for a term of three years, which will have jurisdiction to determine appeals from awards made by the arbitration tribunals. One member of the Board will be designated by the Court to act as Chairman, and the Board will have its offices in New York City. It is expected that the new system of arbitration will go into effect early in the new year.

The Decree contains an "escape clause" which provides that if, by June 1, 1942, the three dissenting companies have not agreed or have not been compelled by the Government to be bound by the trade practices accepted by the five assenting companies, certain provisions of the Decree, particularly those relating to trade-showing and selling pictures in blocks of five, will be set aside as to the five companies. The arbitration provisions of the Decree will, however, remain in force.

The events leading up to this unprecedented action, in which an industry, with the corporation of the Government and approval of the Court, will entrust the administration of its arbi-

tration machinery to a non-governmental, non-official organization under a Consent Decree, is as follows:

In 1923, the Motion Picture Producers and Distributors of America established a system of arbitration, under a standard contract adopted after lengthy negotiations with representatives of exhibitor organizations. The distributors, being few in number, were compactly organized and thoroughly represented in these negotiations. The thousands of individual theatre owners scattered throughout the United States were not thus completely organized and many of them were not represented, although organizations of exhibitors were.

During the use of a standard contract over a period of years, many changes were made in its form, and it later became known as the Standard Exhibition Contract. The system of arbitration it established met with opposition on the part of exhibitors, largely because it was under the control of the distributors and notwithstanding a record of apparent success, as evidenced by the fact that, during a five-year period, 75,408 controversies, involving $18,241,353., were disposed of.

Finally, the Department of Justice took cognizance of complaints that the system was unfair and arbitrary, that it protected the interests of one group as against the other, that it was compulsory on the part of the exhibitor and was prejudicial to the interests of the independent exhibitor, and brought action against the distributors whose practices, it alleged, constituted an unreasonable restraint of trade and forced compulsory arbitration upon the exhibitors against their will.

In 1930, the arbitration provision of the Standard Exhibition Contract was declared illegal by the now well-known decision of Judge Thacher.* There ensued a more or less chaotic condition in the relations between distributors and exhibitors, with renewed charges of unfair trade practices, as a result of which the Government's anti-trust suit was filed in the United States District court in New York against eight major company defendants and numerous subsidiaries and individuals. After four days of opening statements by counsel for both sides, the trial was adjourned to facilitate efforts of the defendants and the Department of Justice to agree upon the terms of a Consent Decree for submission to the Court.

* *U. S.* v. *Paramount Famous Lasky, et al.*, (1930), 34 Fed. (2d) 984.

Consummation of the entire plan was made subject to agreement upon a satisfactory system of arbitration, and it is thought that the bulk of existing causes of dissension and complaint will be corrected by the arbitration machinery.

New Committees Named for Arbitration in National Defense and War Contracts. Important questions arising in connection with the application of arbitration to matters of national defense and national armament have led to the creation by the American Arbitration Association of two new Committees, which will deal with these problems and the expanded activities of the Association along these new lines. Evan E. Young, Vice-President of Pan American Airways System, has been named a Vice-President of the Association and as such will be Chairman of its National Defense Committee, to bring to the attention of American business men the urgency of controlling and isolating economic disputes and methods by which this may be accomplished.

Dr. Nathan Isaacs, of the Harvard Graduate School of Business Administration, has been appointed a Vice-President of the Association and Chairman of the Committee on War Contracts, which will study the use of arbitration in such contracts, as to theory, practice and the legal authorization necessary to preserve the rights of parties entering into war contracts to an arbitration proceeding when disputes arise in this greatly expanded field of activity.

Indiscriminate Use of Word "Court" Prohibited by Law. With its signing by Governor Lehman on March 30, 1940, there became effective an amendment to the New York Judiciary Law (sec. 3) and the General Corporation Law (sec. 9), which prohibits the use of the term "court" by unauthorized bodies, organizations and corporations. The amendment is due largely to the efforts of the New York County Lawyers' Association's Committee on State Legislation, following complaints of the indiscriminate use of the term "court" on the radio and otherwise in a manner frequently misleading to the public, in that the impression was given that such "courts" were vested with judicial power or were part of the judicial system of the State. The text of the amendment follows:

> "Section 3. Use of term 'court' prohibited. No person, firm, association or corporation shall hereafter use or employ the term 'court' as

> part of or in connection with the name of any body, board, bureau, association, or organization or corporation, or in referring to any body, board, bureau, association, organization or corporation, in such manner as to be calculated reasonably to lead to the belief that the body, board, bureau, association, or corporation is vested with judicial power or is part of the judicial system of the State; the use of such term being expressly limited by this section for reference to a court of record or a court not of record, duly organized and existing under the laws of the State as a part of the judicial system of the State."

A striking example of this abuse was set forth in a recent decision of Mr. Justice Wenzel, in the N. Y. Supreme Court, Kings County, in the *Matter of Blake* (N. Y. LAW JOURNAL, December 19, 1939, in which the Court, in refusing to confirm an award of one of these so-called "courts," said:

> "I have listened to a number of such programs on the air, and the ignorance of those in charge of the commonest principles of law was appalling. Atrocious advice has been given to poor, ignorant people which could serve only to multiply the trouble they have brought to these mountebank 'courts'. In the beginning a few men learned in the law permitted themselves to be used in connection with this 'swing time justice' until they realized the iniquity of the scheme. Today, no judge or self-respecting lawyer will lend himself to the capitalization of human misery. Outstanding members of the laity, flattered by the temporary prominence given them, and fancying themselves no little in the role of a 'Solomon come to justice', served in capacities for which they have no qualifications or training. Certainly, no good is accomplished for the poor litigants who are beguiled into making their troubles entertainment for the world, and, assuredly, much harm is done. These 'courts' have no ability, no responsibility and no authority, and should, as a matter of public interest, be discouraged."

Recommendations for a Wider Use of Arbitration in the Real Estate Field. The Committee on Ethics and Arbitration of the Real Estate Association of the State of New York, whose survey of the arbitration machinery established by real estate boards throughout the State was reported in the preceding issue of the JOURNAL, submitted its report and recommendations to the Convention of the State Association held in June of this year, based on the data revealed by the survey.

These recommendations deal primarily with: 1) improvements in the present machinery and the establishment of neutral, impartial machinery for the arbitration of controversies to which one of the parties is not a member of a real estate board; 2) adoption of uniform machinery throughout the 37 member

boards; 3) extension of arbitration to types of controversies in which it is not now used, such as those arising between landlord and tenant, owner and agent, seller and buyer, and employees and agents or owners; 4) adoption of arbitration clauses in leases, contracts of sale or of management and in other written agreements used in the trade; 5) a campaign of education to bring to the attention of members the advantages to be derived from the use of arbitration; 6) an amendment of the by-laws of the State Association to permit it to take a more active part in providing assistance to members desiring to use arbitration.

Real Estate Board of New York Amends Arbitration Procedure. The Real Estate Board of New York has recently amended the provisions of its Constitution as it relates to arbitration procedure, which provide a change in the method of administration of the Board's arbitration machinery, while not affecting the existing arbitration procedure in any vital respect. The amendments set up an Arbitration Committee of seven members as an administrative body, which, in turn, makes recommendations for an Arbitration Board of not less than twenty-five members, to be appointed by the President with the approval of the Board of Governors.

The Arbitration Committee also has as its duties the establishment of rules for the conduct of arbitration, the determination of any question as to whether a matter submitted is properly one for arbitration, and the obligation of a member to submit such matter. Differences between members, when one party is not of the membership classification wherein arbitration is obligatory, or where both parties are non-members, may be submitted provided mutual request is made to the Board to act in such disputes.

India Arbitration Act of 1940. While commercial arbitration is occupying much the same hazardous position in Europe and Asia as do the war-harried citizens of the countries now at war, it is encouraging to note that arbitration still progresses abroad as well as at home. News comes to the JOURNAL from its collaborator at Cawnpore of the enactment of the "India Arbitration Act of 1940," which received the assent of the Governor-General of India on March 11, 1940, and became effective July 1, 1940. The present law, which extends to the whole of British India, repeals

the Arbitration Act of 1889, as well as those provisions in the Code of Civil Procedure and certain additional acts which have heretofore been controlling in commercial arbitration.

The several sections of the new Act deal with the various conditions of an arbitration as (Chapter II) Arbitration without Intervention of a Court; (Chapter III) Arbitration with Intervention of a Court Where There Is No Suit Pending; (Chapter IV) Arbitration in Suits; (Chapter VI) Appeals. Other chapters cover the general and miscellaneous provisions of the Act, which also contains a section relating to the Implied Conditions of Arbitration Agreements.

The text of the Act is too long for reproduction in the JOURNAL, but may be found in COMPARATIVE LAW SERIES, August 1940 (Vol. III, No. 8, published by the Division of Commercial Laws of the United States Department of Commerce).

INDUSTRIAL ARBITRATION*

ARBITRATION CONQUERS A NEW FIELD

BY

MARTIN GANG †

IN 1927 the legislature of the State of California enacted an arbitration law, patterned to some extent upon that in force in the State of New York. Prior to that time, however, California had not been a stranger to arbitration. In fact, commercial arbitration in California was widely used in various branches of the marketing of agricultural products through cooperatives and in the trades which had contacts with business people in other countries and states.

A survey conducted by the writer, as a fellow of the American Arbitration Association, revealed the widespread use of arbitration in the State of California and when the facts revealed by this survey were presented to the legislative committee considering the arbitration law they undoubtedly influenced that committee in recommending the enactment in the State of California of a modern arbitration law.

Arbitration as an instrument of an advancing civilization has entered a new field in California as a result of a contract negotiated between the Screen Actors' Guild and the Artists' Managers Guild. The motion picture industry has its base in Southern California. Statistics have often been cited to show the importance of the motion picture industry in the national and international economy. Certainly the motion picture industry is probably the best known industry of California and is, economically, one of the most important to the state. Because of the emotional temperament of people engaged in such an industry, which is to a certain extent creative, the disputes and controversies have probably been more in number than in other groups of

* Court decisions relating to industrial arbitration will be found in the section on Arbitration Law, beginning on p. 158.

† Member of the California Bar; Secretary, Los Angeles Committee of the American Arbitration Association.

the population. Because of the publicity connected with people in the motion picture industry, many such disputes and controversies which have become subjects of litigation have been detrimental to the industry as a whole. This adverse publicity was a very important factor in motivating the two contracting parties to include arbitration of disputes as a cardinal point in the contract. In considering this it may be well to give the background of both organizations.

The Screen Actors' Guild is a union of actors engaged in rendering their services as actors in the motion picture industry. It has been said that the Screen Actors' Guild is an unique labor organization, by reason of the fact that many of its members and all of its well-known members are persons who receive salaries far in excess of those ordinarily paid to people in other industries.

The professional affairs of these actors are, for the most part, conducted for them by a specialized group of individuals who are called agents. Agents sometimes refer to themselves as managers, and it is for that reason that the group formed by these agents named itself the Artists' Managers Guild. The services rendered by agents for their clients are intimately personal and require not only the ability to get along with people, but also a detailed knowledge of the motion picture industry. Thus an agent or manager not only acts as a negotiator of employment for his client, but even after the client is employed the agent acts as a buffer between his client and the employer of his client with reference to stories in which the client is to appear and also with reference to any of the thousands of other details which arise in such a personal relationship.

The position of the agent, while lucrative, is not entirely a happy one. On the one hand, it is his duty to do the best he can for his client; on the other hand, he is dealing with people who are very often emotional and who may not have the perspective which the agent has acquired through his years of training. In his dealings on behalf of his client the agent is confronted by employers and prospective employers. These people have been doing business with the agent over a period of years and expect to do business with the same agent for many more years. Personal relationships have grown up between various employers and various agents, some good and some bad. In any event the

agent is the man between the employer and the client and he often receives complaints and reprimands from both sides.

Out of this situation there naturally grew numberless disputes and controversies between agents and their clients. Clients complained because they thought agents were not doing enough for them or that the agents were too friendly or not friendly enough with employers, or preferred some of their clients to others, and for many other reasons.

These controversies and disputes created a great deal of unhappiness and litigation. Soon after its formation, the Screen Actors' Guild began receiving complaints from its members about abuses committed by agents. A thorough investigation was carried on by the Screen Actors' Guild, as a result of which the conclusion was reached that there were many and serious abuses in the relationship between agents and members of the Screen Actors' Guild. An announcement was made that the Screen Actors' Guild intended to license and regulate agents for the express purpose of eliminating the abuses which had been discovered in the investigation. It was the original intention of Screen Actors' Guild to institute such licensing as an unilateral action on its part for the purpose of protecting its own members. As soon as the announcement was made, however, a committee of the Artists' Managers Guild made representations to Screen Actors' Guild against such procedure.

As a result of these representations, it was decided that the Screen Actors' Guild and the Artists' Managers Guild would appoint committees to negotiate a contract between them, which would have specific reference to the licensing of agents. These negotiations began in September, 1938, and were concluded by the execution of a written agreement on November 1, 1939. This agreement is some 87 printed pages long. It purports to cover every phase of the relationship between actors and their agents. It sets forth standards of practice and ethics and also provides punishment and penalties for infraction of the rules and regulations.

Arbitration is one of the fundamental concepts upon which the entire agreement rests. It is specifically provided that all disputes and controversies between agents and their clients and between actors and their agents must be arbitrated. It is further provided that any disputes between the Artists' Managers Guild

and the Screen Actors' Guild must be arbitrated. Furthermore, should any proceeding be instituted to punish any agent for any infraction of the regulations the matter must be arbitrated. In other words, no action can be taken by any of the parties bound by the agreement save and except subject to the arbitration rules and regulations specifically set forth in the agreement.

In the course of the negotiations it appeared that many of the agents were unfamiliar with the principles of arbitration. These persons expressed the fear that the arbitration procedure which was being discussed would result in unfairness to them. Their prejudices were overcome by reason of the fact that some years ago the American Arbitration Association had selected a panel of arbitrators for the district of Southern California. The personnel of this panel was such as to convince the objectors to arbitration that the calibre of arbitrators selected from the panel would be equal to, if not superior to, the calibre of judges sitting upon the bench in the Superior Court in the County of Los Angeles. That statement is not made in disparagement of the judges, but is a tribute to the high standing of the men who consented to serve on the panel of the American Arbitration Association. It was pointed out that these arbitrators are volunteers who have agreed to contribute their time, without compensation, as a public service. The fact that these men do not have to be elected and are under obligations neither to the electorate nor to any persons who may be influential in securing their appointment as judges bore weight. In any event, the principles of arbitration were incorporated into the agreement as an integral part thereof and they may now be said to be accepted wholeheartedly by all parties.

The specific rules for arbitration, as set forth in the agreement, were taken to some extent from those rules which have been worked out over a period of years by the American Arbitration Association. From time to time the needs of this particular group of persons may probably require some alterations in the rules to meet the particular problems of the motion picture industry. However, it was decided to follow the general plan used by the American Arbitration Association for the time being and to make such changes in the future as experience might dictate.

The agreement provides for the naming of an arbitration secretary. Any person desiring arbitration would file with the

arbitration secretary a brief written statement of his claims, in which would be named the person selected as an arbitrator by the claimant, the person starting the arbitration. The secretary would then notify the person with whom arbitration is sought, who is referred to as the respondent. The claim must be answered by the respondent, who is likewise required to name the arbitrator selected to act on his behalf. The two arbitrators named as aforesaid are to select a third arbitrator and, in the event of failure to agree, the third arbitrator is to be named by the American Arbitration Association.

The arbitration tribunal so selected has complete control of the conduct of the arbitration and may specify rules and regulations with reference thereto. A decision of the majority of the tribunal is final.

The parties are entitled to be heard and to be represented by counsel, but the arbitration tribunal need not be bound by the technical rules of evidence, and may conduct the hearing as the arbitrators deem proper, subject always to the requirement that the parties be given a fair and impartial hearing.

For situations which may arise where no rules have been enacted, it is provided that the rules of the American Arbitration Association shall apply. Proceedings are not to be publicized.

The contract has been effective since November 1, 1939. In the first few months of its operation the expected deluge of complaints occurred. However, what many had not expected also happened, to wit, most of the complaints which have been filed have been ironed out by conciliation without the necessity for actual arbitration.

The course of arbitration in this emotional, controversial and excitable portion of the motion picture industry will be followed with interest by many. Arbitration here will do a great public service. It will keep out of print many disputes and controversies which add nothing to the standing of the participants or the industry. It will save a great deal of time and energy which would otherwise be wasted in litigation. It should promote better understanding between all parties to the contract and thus do its bit towards a saner, happier world for all to live in.

NOTES AND COMMENT

Arbitration Provisions in Important Defense Contracts. The Tennessee Valley Authority and the Tennessee Valley Trades and Labor Council, representing fifteen unions affiliated with the A. F. of L., entered into a labor agreement on August 6, 1940, which covers the 8,000 building and metal trades workers engaged in construction and maintenance operations of the project. Preliminary grievance machinery is provided for in Article VIII of the contract, which also provides that any dispute which cannot be so adjusted may be referred, by petition of one or both parties, to a Joint Board of Adjustment, composed of two members and two alternates designated by the Authority and a like number designated by the Council. The Board is empowered to formulate rules to govern proceedings brought before it, and majority decisions are final.

The weak spot of the arbitration procedure appears to be the provision of the agreement relating to matters upon which the Board of Adjustment is unable to arrive at a decision, which would seem to be highly probable where, as in this case, the Board consists of an equal number of representatives from both sides to the controversy. Where the Board has not reached a decision *within sixty days after the completion of the hearings thereon,* the disputants shall be so notified and thereupon the Board shall, with the concurrence of either party to any such unadjusted dispute, submit same to an impartial person to be known as a referee, who shall be selected from a panel of five suitable persons designated and maintained by the Board of Adjustment. Then, apparently, sixty days after the close of the original proceeding, another hearing would take place.

In another important national defense industry, an agreement between the Maryland Drydock Company and the Industrial Union of Marine and Shipbuilding Workers of America also carries the possibility of deadlocks or delays. The agreement provides for the setting up of an Arbitration Board in each instance when the grievance machinery fails to dispose of a dispute. One member of such Board is to be designated by the Company, one by the Union, with the third member, or chairman, chosen by mutual agreement. There is a further provision that when the parties are unable to agree upon the third member within one week after the original appointments, Judge Eli Frank,

of the Maryland Supreme Court, "shall be requested to designate him, and the choice so made shall be binding upon the Company and the Union." There is, however, no provision for a substitute method of appointment in the event Judge Frank refuses or is unable, for any reason, to designate the chairman of the arbitration board.

U. S. Conciliation Service Active in Defense Industries. During the past month conciliators of the United States Department of Labor have been successful in bringing to a close a number of controversies between management and labor which threatened tie-ups in industries engaged in the manufacture of defense items, over a large area. The localities and the products or services involved included a New Orleans plant producing fast patrol boats; a Brooklyn company manufacturing naval running and signal lights; a Milwaukee foundry making motor parts for marine installation; the completion of air bases and facilities at a number of naval sites in the Puget Sound area; deliveries of motors intended for the Philadelphia Navy Yard, held up by a strike of New Jersey long-distance truck-drivers; the manufacture of gas masks by a Detroit concern; production of powder by a corporation having plants in Ohio and Kentucky; the manufacture of submarine parts by a Detroit factory, and others.

Arbitration in Aircraft Manufacture. The recent averting of a strike of 7,000 union mechanics of the Boeing Aircraft Company's plant in Seattle, Washington, when the workers and the management were able to dispose of their differences by arbitration, is another indication of the part arbitration is playing in protecting this country's armament program and helping to speed up national defense.

In addition to the Boeing Company, there are a number of other manufacturers of aircraft and parts which have provided for arbitration of disputes in their agreements with labor. Among the companies that have negotiated contracts with the locals of the International Association of Machinists (A. F. of L.) and United Automobile Workers of America (C.I.O.) are Curtiss-Wright Corporation, Consolidated Aircraft Corporation, Beech Aircraft Corporation, Lockheed Aircraft Corporation, Vega Airplane Company and Bendix Aviation Corporation. Each of the twelve agreements entered into contains some provision for the

settlement of disputes and grievances that may arise during the life of the agreements, and resort to lockouts and strikes is limited, in some manner, in all of the agreements except one.

Method of Agreeing upon Impartial Arbitrator. One of the chief difficulties encountered by the parties to an arbitration agreement, when the occasion arises to set the arbitration machinery in motion, is in agreeing upon a mutually approved, impartial arbitrator. When each party makes nominations for this office, these difficulties are bound to arise. In the event the parties are proceeding under rules whereunder the administrative agency makes nominations for the office of arbitrator, the danger of a deadlock is lessened, but even here they sometimes occur.

For example, the Rules of the Voluntary Industrial Arbitration Tribunal provide for the submission of identical lists of arbitrators, taken from the Panel, to each party to the proceeding, with instructions to eliminate those names to which there may be objection and to number the remaining names in the order of preference. The practice under these Rules is for each party to proceed independently and return the list. Unless this method is followed there may be delay. For example, when such lists were submitted to a union and an employer in Richmond, Virginia, the parties, instead of making independent selections from the lists, consulted each other as to a choice, with the result that after several months they were unable to agree upon any name. When this situation was made known to the Tribunal, another list of names was submitted, with the suggestion that the parties follow the recommended procedure of selecting names independently and without consultation. The result was that the returned lists contained a number of names approved by both union and employer and from these approved names the arbitrator was designated—in this case a former judge of the Supreme Court of Virginia.

Automobile Industry Names Dr. Millis as Umpire. A new era in labor relations in the automotive industry was indicated by announcement of the appointment early in October of this year of Dr. Harry A. Millis as Umpire on labor disputes between the General Motors Corporation and the United Automobile Workers of America, fulfilling a clause in the contract signed by the Corporation and the Union in June. Dr. Millis is professor emeritus

of economics at the University of Chicago and long a national figure in labor arbitration. He will have broad powers, as a court of final appeal on specified points of difference, deciding conflicting claims even on such questions as working hours, strikes and stoppages, which are not settled by ordinary grievance machinery. Wage rates and timing of operations, however, are excluded from his jurisdiction.

Women's Coat & Suit Industry Selects New Chairman. In the $260,000,000 women's coat and suit industry, with its 35,000 workers and 2,000 employers, a collective agreement was entered into in July, which contemplated the appointment of an impartial chairman to serve for the two-year period of the contract. James J. Walker, former mayor of New York City, was named for this office on September 5, 1940, by Mayor La Guardia, to whom the International Ladies' Garment Workers' Union and the employers' associations signatory to the agreement had left the choice of the umpire. He will decide disputes growing out of industrial relations and rule on matters upon which the parties could not agree when the new contract was signed.

New York Publishers Establish Adjustment Board. In the New York publishing field, Sidney A. Wolff, a member of the National Panel of Arbitrators of the American Arbitration Association and of the panel of the New York State Board of Mediation, has been named impartial chairman of the adjustment board provided for in the agreement between the Publishers' Association of New York and the Newspaper and Mail Deliverers' Union of New York City. The appointment of Mr. Wolff followed his designation by Edward F. McGrady, to whom publishers and Union had made a request for a recommendation for impartial chairman.

Alternate Chairmen under Two-Year Labor Agreement. A two-year collective bargaining agreement in the knitted outerwear industry, between the United Knitwear Manufacturers' League, Inc., and the Knitgoods Workers' Union, Local 155 of the International Ladies' Garment Workers' Union, provides for alternate impartial chairmen to determine disputes which cannot be disposed of by representatives of the Union and employers. Dr. Paul Abelson and Prof. Herman A. Gray are named in the agree-

ment, with power to appoint a substitute impartial chairman if either of them is unable to act, and upon their failure to do so, an alternate chairman will be named by the Mayor of the City of New York.

Designation of Impartial Chairman by Archbishop. A unique method of naming an impartial chairman is provided in the agreement between Essex County (N. J.) contractors and workers. In the event of the inability of a joint arbitration board to agree upon a chairman, the latter is to be designated by the Archbishop of the Catholic Archdiocese of Newark.

Arbitration and German Labor, 1918-1933. Some little known facts about the German labor movement during the years 1918-1933 have been set forth by Dr. Frieda Wunderlich, former professor at the Berufs-Pädagogische Institut, Berlin, and Director of the Bureau für Sozialpolitik, in a book entitled *"Labor Under German Democracy: Arbitration 1918-1933."* * Faced, as it is, with the problem of developing a system of arbitration in order to carry out its declared intent of avoiding strikes whenever possible during the national emergency, American labor is warned by the author against imitating the policies adopted by labor and industry under the German Republic. It was in this period that the function of arbitration gradually passed from the hands of the parties and, without reference to its original character, was used as a means of enforcing state policy in a mild dictatorship.

Dr. Wunderlich concludes her chapter on *"The Effect of Arbitration on Trade Unionism"* with the following statement concerning the fate of arbitration under state control:

> "Reliance on arbitration tended to weaken union influence on the rank-and-file. Workers lost interest in their organizations when they found that wages were fixed by the state, and came to believe that the unions could no nothing for them. Knowing that no arbitrator would grant everything asked for, union leaders were ready to endorse every rank-and-file demand without explaining that limits necessarily existed. Thus the masses lost all understanding of what was economically possible and became discontented. The unions, believing themselves powerful in the backing of state authority, did not heed the discontented masses. The unemployed, seeing that the unions were interested only in those with jobs, gave ear to agitators who accused the unions of

* Published by the New School for Social Research, New York, 1940.

increasing unemployment. Unions lost much of their fighting spirit, spontaneity, self-reliance and power of attraction. Petrifaction was the price paid for changing from free organizations into semi-official state organs.

"Compulsory arbitration thus revealed the tragedy of German labor, *viz.* its failure to recognize the limits of state interference."

The War's Effect on the Rights of Labor in Europe. John G. Winant, Director of the International Labor Office, who recently returned to the United States, reports in the CANADIAN CONGRESS JOURNAL for September, 1940, on *"What War Is Doing to Labor in Europe,"* with particular reference to the cooperation of workers and the British Government, and relates what has happened to the rights of labor in the invaded countries. The following are excerpts from the article:

"There has been complete destruction of the trade union movement in Germany, Austria and Czechoslovakia and in the conquered democracies. All the achievements of a lifetime of the European workers, which had been obtained at a cost of great sacrifice, have been wiped out in the course of a few months. All that the free trade union movement has stood for—the right of being heard, the right of consultation, the right to negotiate—has been abolished. These rights of organized labor which found expression in the recognition of the trade union movement as a party with equal rights with the employers' organizations were consecrated by the Constitution of the International Labor Organization established in 1919 to promote social justice.

"In Great Britain, the last bulwark of democracy in the old world, the organized workers have accepted freely, spontaneously, and in common accord with the employers, compulsory arbitration and the outlawing of strikes and lockouts for the duration of the war. Their action is based on their knowledge that today with them all things depend on the strength of national defense. Without sacrificing their autonomy or independence, the British trade union workers sharing the responsibilities of Government through their chosen representatives, have themselves recommended the adoption of the Emergency Powers Defense Act, which grants the most drastic authority a free people has ever conferred upon its government. The Secretary of Labor and National Service has been charged with the creation of a new arbitration board to adjudicate disputes on working conditions.

"On the outcome of the present struggle between Great Britain and Nazi Germany depends the future of labor and the labor movement in Europe. If Britain falls, the whole of Western and Central Europe will pass under a totalitarian rule that will obliterate the gains made in one hundred and fifty years of struggle and sacrifice, and place the American worker in the front line of defense."

INDUSTRIAL ARBITRATION AWARD

An Arbitration Proceeding in Three Parts. A three-part arbitration, in which the way to a final determination of the basic questions at issue between the parties was cleared by a prior determination of: 1) whether the matters in controversy were properly within the scope of the arbitration provision of the contract, and 2) the place in which the proceeding should take place, was completed in July, 1940, in the Voluntary Industrial Arbitration Tribunal of the American Arbitration Association. The parties to the proceeding were the American Federation of Radio Artists and National Broadcasting Company, Columbia Broadcasting System and WGN, Inc. (Mutual Broadcasting System).

In February, 1939, a contract setting up a Code of Fair Practices for Commercial Broadcasting was entered into by the Guild and the broadcasting companies. At the insistence of the latter, the rates and conditions applicable to Chicago were excluded from the operation of the Code and deferred pending further negotiations. When these negotiations failed after some nine months, the Guild demanded arbitration of the differences with the companies, under the arbitration provision of the Code. The companies objected to arbitration on the ground that, since Chicago wage rates had been exempted from the Code, the arbitration provision did not apply and the Guild had no right to go forward with the arbitration.

The arbitration of the dispute as to whether the question of wages in Chicago local broadcasting was subject to arbitration under the contract proceeded before three arbitrators selected by the parties from the Panel of the American Arbitration Association: Nathan Isaacs, of the Harvard Graduate School of Business Administration; George Z. Medalie, New York attorney, and Wesley A. Sturges, of the Yale University School of Law. The arbitrators found in their award that "the question of wages in Chicago local broadcasting is subject to arbitration under the said contract," and that "the scope of the arbitration clause in said contract is not limited to rates or scales but includes terms and working conditions so far as not inconsistent with the specific provisions of the contract."

In the meantime, another difference between the parties had arisen. The companies contended that any arbitration proceeding that might result from the decision of the arbitrators in the above proceeding should take place in Chicago. The Guild opposed

this demand on the ground that the contract had been made in New York and that its headquarters, as well as those of the companies, were in New York.

The question of the place of the arbitration was then disposed of, by referring it to the Arbitration Committee of the American Arbitration Association, as provided in the Rules under which the parties had agreed to arbitrate. After hearing the arguments of representatives of both parties, the Committee made a sealed ruling, opened upon termination of the first proceeding, that the place of the arbitration should be New York City.

With these preliminary differences disposed of, an arbitration board consisting of Dr. Isaacs, Dr. Sturges and George K. Bowden, Chicago attorney, then proceeded to determine the remaining differences between the Guild and the broadcasting companies which, briefly summarized, were: 1) Whether the provisions of the Code of Fair Practices applied to local commercial broadcasts produced in Chicago at the major stations of the companies concerned; 2) What rates would be paid radio artists (singers and actors) in Chicago; and 3) What rates would be paid announcers in Chicago, particularly staff announcers called upon to perform special services in connection with commercial broadcasts.

In their award, the arbitrators: 1) ruled that the working conditions and rules and rates for rehersals laid down by the Code should apply to local commercial broadcasts produced in the Chicago stations of the Companies; 2) established minimum rates for the services of radio artists for fifteen-minute, half-hour and hour periods, and 3) determined the rates to be paid station announcers used in commercial broadcasts and the method to be followed in adjusting their regular salaries when they receive pay at such rates.

INTER-AMERICAN COMMERCIAL ARBITRATION

LABOR ARBITRATION IN CHILE *

BY

DR. HEINZ SCHWENK

WHEREAS in this country a general mediation or arbitration statute does not exist, the South American states have found it necessary to enact such a law in order to prevent industrial strife. Among them Chile takes a very prominent place. Its arbitration law forms a part of the Labor Code enacted in 1931.[1]

1. *Boards of Labor Arbitration and Their Composition.* The Labor Code of Chile sets up a Permanent Board of Conciliation in each department. This Board consists of six members. Three of them act as representatives of the employers, two as representatives of the manual laborers and one as representative of the "white collar" employees. The Board sits in the capital of the department and is presided over by a higher inspector of labor, who has no right to vote. For the purpose of electing the members of the Board in December of every year, the unions and associations of employers present a list to the governor which contains the names, professions and residence of three persons and states the enterprise in which they work. The Permanent Board of Conciliation is appointed by the governor on the basis of this list, or directly, in the absence of it, and serves for one year.

The members of the Board must be: (1) citizens of Chile, (2) twenty-one years of age, (3) able to read and write, (4) residents of the department during at least six months, (5) not punished nor prosecuted at the present time for a crime. The person appointed is obliged to accept the office unless there is a legal

* Part of a thesis for the LL.M. submitted to Tulane University, College of Law, and titled *Labor Arbitration in Europe, the British Dominions, South America and the United States.*

[1] Labor Code of Chile, D.F.L. No. 178, of May 13, 1931, as amended by Law No. 5405 of February 14, 1934 (Articles 511-539).

reason for refusal. The Board is called into action by its president whenever a strike or lockout occurs. The representatives of the employees cannot be dismissed by their employer without sufficient reason recognized by the "judge of labor." This protection will exist for a period of six months after the expiration of the office.

Special Permanent Boards may be created for certain industries by a decree, which will also determine the domicile of the board, its jurisdiction and the regulations concerning the election of the members.

In addition to the Permanent Boards of Conciliation, there is an Arbitration Court, which is made up of one or three arbitrators, as the parties decide. If they do not agree on the number, three will be appointed. The parties have the right to choose them, but if they cannot come to an accord, the Ministry of Social Welfare elects them.

2. *Competence of the Boards.* The Permanent Boards of Conciliation have to try to bring the parties to an agreement. If they fail in their efforts and the parties do not want arbitration, the Board so reports. This report sets forth the causes of the conflict and an outline of the deliberations and obligations which seem to be proper to both parties in regard to the various points in controversy. In case of strike or lockout, the report has to be made in any event. The report states: (1) that the award made by the president of the board has been rejected by both parties; or (2) that the award accepted or suggested by one of the parties has been rejected by the other party.

If, after successful conciliation, one of the parties breaks the agreement, the president orders the publication of the report on application of an interested person and, in his absence, on petition of the inspector of labor. This report will contain the causes of the conflict, the development of the negotiations, the complete text of the agreement, the name of the party who has broken it, the point of the agreement which was subject of the breach and the motives for breaking it.

The Arbitration Court has to make an award, which has the form of a judgment.

3. *Procedure Before the Arbitration Boards.* The conciliation procedure is compulsory, *i. e.*, both parties are bound to submit

the controversy to conciliation. If they refuse to do so, they will be punished. The president of the Permanent Board of Conciliation determines the manner and conditions under which the parties are heard, and fixes the number of persons charged to represent the parties. The employers or their legal representatives must appear personally, and only in a case of a legal and justified obstacle are they entitled to representation. The representatives must belong to the enterprise affected, and their authority must be extended to all questions of the conflict, including the acceptance of the agreement. In the first session the Board hears separately the employer and employees involved in the dispute. Later both are heard in the same trial. The Board may delegate to two or more of the members the examination or confirmation of circumstances of law or fact which are the basis of the conflict.

If the parties arrive at an agreement a record of it is made in the same session and confirmed by the members of the Board, the parties or their representatives and by the secretary of the Board. If they do not arrive at an agreement, a report is made. In such a case the parties may at least agree to submit the conflict to arbitration. If they do not, the proposal to arbitrate may be made by the president of the Permanent Conciliation Board.

The arbitrators of the Arbitration Court may arrange for any investigation which is necessary to clear up the points in controversy. They may be assisted by inspectors of labor or experts. The judgment is entered according to a majority vote and is required to be rendered within thirty days after the formation of the Board. The judgment of the Arbitration Court is binding for the time stated in it, but, in any event, for at least six months.

4. *Awards of the Labor Arbitration Boards.* The Permanent Conciliation Boards are not concerned with awards. The Arbitration Court makes an award which, as stated above, is binding on the parties during the time determined in the award, with a minimum period of six months. When the award is not accepted by the employer, he cannot employ workers upon terms other than those fixed in the award during the time the award is in effect. The violation of this rule is punished with a fine up to 150,000 pesos. If the employees do not accept the award they may be dismissed immediately without compensation and pun-

ished with a fine of 1,500 pesos. The punishment will also be imposed on the trade union to which the employees belong. This trade union may also be dissolved on application of the Permanent Conciliation Board. The sanctions against the trade unions, however, are only applicable if they do not exercise the power of impeachment against the employees.

5. *Strikes and Lockouts.* No interruption of work before the conciliation procedure has been exhausted is allowed in any enterprise which has registered more than ten employees. In case the dispute proceeds to arbitration, the work in the enterprise has to be continued until the court has entered judgment. A definite procedure is provided in order to prevent the outbreak of a serious labor conflict. Whenever a question arises which might cause a conflict of a collective character, the employees must form a delegation of five members, which shall try to bring about a settlement of the dispute with the employer. The delegates must be twenty-five years of age and have been employed for one year in the enterprise. The employer must receive the delegates within the twenty-four hours following the written petition of the employees. If the employer cannot make up his mind immediately, he cannot delay his answer longer than five days, unless the delegates agree.

After the outbreak of a collective dispute no employee may be removed from his position unless he acts against the goods or property of the enterprise or endeavors to curtail consumption of the products of the enterprise. In case of a strike or lockout in an enterprise which is important for the economic life of the population, the government may order the resumption of work. If such an order is given, the working conditions of the necessary personnel cannot be inferior to those determined in the report of the Permanent Board of Conciliation.

Summarizing, the settlement of labor disputes in Chile takes place in two steps, the first of which is mediation and the second, arbitration, if mediation fails. Both mediation and arbitration are compulsory, and the award resulting from arbitration is binding. Strikes and lockouts are prohibited until the award has been made.

ARBITRATION PROCEDURE IN MEXICO *

BY

HENRY P. CRAWFORD [1]

THE new Federal Code of Civil Procedure of Mexico (August 30, 1932) is a noteworthy contribution to the science of adjective law in the modern world. It is obvious that long and careful consideration was given to the reformation of the section on Arbitration Procedure (*Judicio Arbitral*) which now appears as title VIII, and which, through consolidation and restatement, reduces the 117 articles of the previous code (arts. 1240-1357) to 27 succinct articles in the new (arts. 609-636).

Under the new procedure, the parties are specifically granted the right to submit their differences to settlement by arbitration. The agreement may be made before judicial proceedings are instituted, during proceedings, and after judgment has been rendered, irrespective of the status reached. However, a compromise agreement made subsequent to final judgment will take effect only if the parties at interest acknowledge it. The agreement may be drawn in the form of a public document, a private document, or by stipulation in open court, whatever may be the amount involved.

Preparatory Measures for Arbitration Proceedings. When the interested parties have submitted their differences to arbitration by means of a private or public writing, but have failed to name the arbitrator, his appointment must be made by the court before the arbitration proceedings may commence. For this purpose, the document containing the arbitration agreement may be presented by any of the interested parties. The court will thereupon call a hearing within 3 days in order that the parties may appear and appoint an arbitrator, notifying them that upon their failure to do so the appointment will be made in default.

If the compromise clause forms part of a private document, upon serving notice of the hearing upon the other party the clerk of the court (*actuario*) will first require the party to acknowledge his signature on the document. If he refused to answer the second notice his signature will be considered as having been acknowledged.

* Reprinted from COMMERCE REPORTS, July 20, 1940.

[1] Of the Division of Commercial Laws, Bureau of Foreign & Domestic Commerce of the U. S. Dept. of Commerce.

At the hearing the court must endeavor to select an arbitrator mutually acceptable to the interested parties. Where this is impossible the court will designate one from among those persons who are listed annually by the Superior Court for this purpose. The same method will be followed when the arbitrator appointed resigns, and a substitute has not been designated. The arbitration proceedings will then be initialed, based upon the record of the above hearing, the parties being served in accordance with title VIII. (See arts. 220-223, comprising an entirely new proceeding under this code.)

Who Are Competent Parties. All persons who enjoy freedom in the exercise of their civil rights may settle their affairs by arbitration. Nevertheless, guardians may not compromise the affairs of those laboring under a disability nor may they name arbitrators except with the approval of the court, save in the case where those laboring under the disability are heirs of the person who entered into the arbitration agreement, or who established the arbitration clause. Should there be no designation of arbitrators, the appointment will be made by order of the court as provided in the preparatory measures cited above.

The executors of a will require the unanimous consent of the heirs to settle the affairs of the inheritance by arbitration and for the purpose of naming arbitrators, except in the case where they are endeavoring to carry out the agreement or compromise clause entered into by the author. In this case, there being no arbitrator named, it will be done necessarily by judicial intervention. Further, syndics of insolvency proceedings may settle by arbitration only with the unanimous consent of creditors.

Matter Excluded From Arbitration. The right to receive annuities for support, divorces (except with respect to the division of property and other differences of a purely pecuniary nature), actions for the annulment of a marriage, transactions concerning the civil status of persons (with the exception of the provisions of article 339 of the Civil Code), and all others which the law expressly prohibits, may not be compromised by arbitration.

Elements of the Agreement. The Mexican arbitration agreement must describe the matters submitted to arbitration proceedings and the name of the arbitrator. If the first element is lacking, the agreement is null and void as a matter of law without the necessity of a prior judicial decision. If arbitrators are not

designated, it is understood that the right is reserved to appoint them by intervention of the court according to the preparatory measures. The agreement will be valid, however, even though no period of time for the arbitration procedure is stipulated; in this case, the mission of the arbitrators will last 100 days when dealing with the ordinary action, and 60 days if the matter is of a summary nature. The period of time is counted from the date when the appointment is accepted. During the period of time of the arbitration, the arbitrators may not be recalled except by the unanimous consent of the parties.

Elements of the Proceedings. In the actual arbitration proceedings the parties and the arbitrators must observe the periods of time and forms established by the courts unless the parties have already agreed to other stipulations. Irrespective of stipulations to the contrary, however, arbitrators are bound to receive evidence and to hear any of the parties who request it. Although the parties may waive the right of appeal, when the agreement to arbitrate is entered into with respect to a matter which has reached the stage of appeal, the arbitration award shall be final without further recourse.

The arbitration agreement gives rise to pleas in abatement to the jurisdiction and of litispendency (*excepciones de incompetencia y litispendencia*) if the matter is tried before an ordinary court during the life of the agreement.

When there is but one arbitrator, the parties are free to appoint a secretary; if they fail to agree in this respect within 3 days from the time the arbitrator takes office, the latter will appoint a secretary at the expense of the parties. Where there are several arbitrators they will select one from among themselves to function as secretary, nevertheless, without the right to claim greater emoluments.

Termination of the Agreement. In harmony with present Mexican procedure, the arbitration agreement is terminated in a variety of ways: First, by the death of the arbitrator appointed by the agreement or under the arbitration clause, provided there is no substitute; but in cases where the parties have designated the arbitrator by judicial intervention, the agreement is not extinguished by his death, and the appointment of a substitute will be made in the same manner in which the first was selected. Second, by excuse of the arbitrator because of illness which pre-

vents him from discharging the duties of his office. Third, by a challenge for cause according to law when the arbitrator has been appointed by the court, since the arbitrator named by common consent of the parties may not be challenged. Fourth, by appointment of the arbitrator as magistrate, proprietary, or acting judge for more than three months, or any other employment in the administration of justice which would interfere with the office of arbitrator as a matter of fact or of law. Fifth, by the expiration of the period stipulated or the legal periods of 100 and 60 days, respectively, already discussed under "Elements of the Agreement."

However, arbitrators may be challenged only for the same causes as other judges, and where it becomes necessary to replace an arbitrator the periods of time are suspended during the time necessary to make the new appointment. Judges of the ordinary court will hear challenges and excuses of arbitrators in accordance with the law and without further appeal.

Powers and Duties of Arbitrators. The award must be signed by each arbitrator; if there are more than two and the minority refuses to do so, the others will enter it upon the record and the award will have the same effect as if it had been signed by all. A private vote does not exempt one from the obligation to sign.

If the arbitrators are authorized to name a third arbitrator in case of dispute, and they are unable to agree, they must appeal to the court of first instance. Where the third arbitrator named by reason of the disagreement is appointed when there are less than 15 days remaining before the expiration of the term of arbitration, and the parties themselves fail to extend it, he may have 10 days added to the term for the purpose of rendering his award. In any event, arbitrators must render their decision according to the rules of law except where the agreement or the compromise clause entrusts to them a friendly composition or an award based upon good conscience.

Arbitrators may take jurisdiction over incidental steps (*incidentes*) in procedure where, without a decision thereon, it would be impossible to render an award in the principal matter. They may also hear peremptory exceptions (corresponding to the common law plea in bar, or the general demurrer or motion in code practice), but not a cross bill, except where it claims compensation in an amount equal to the bill of complaint or when

it has been expressly stipulated. Further, arbitrators may condemn the parties to payment of costs, damages, and even impose fines, but in order to make use of judicial compulsion they must obtain an order from an ordinary court (*juez ordinario*).

After the award has been rendered, the record of the case shall be passed to the ordinary court for execution, unless the parties request an explanation of the decision. For the purpose of enforcing arbitration awards and decrees, "one shall have recourse" also to the court of first instance. If there are grounds for an appeal which might be admissible, the judge who receives the record in the case will admit the appeal and will thereupon remit the record to the Superior Court, being subject, in all such proceedings, to the provisions governing ordinary proceedings.

What Court Has Jurisdiction. The court designated in the arbitration agreement, or in the absence of such designation, the judge of the place of the tribunal of arbitration, and there being several judges, "the one with the lowest number" is competent for all acts relative to arbitration proceedings "in that which may refer to jurisdiction which the arbitrator may not have," and for the execution of the award and admission of appeals. Judges of ordinary courts are obligated to impart the aid of their jurisdiction to arbitrators. An appeal will be admissible only in accordance with the rules of the common law; the *amparo* of guarantees is admissible against the decisions of an arbitrator appointed by the court, although the court should compel arbitrators to comply with their obligations.

NOTES AND COMMENT

Pan American Lawyers Association. An organization of lawyers directly interested in and engaged in the practice of law in inter-American matters was recently organized in New York City under the presidency of Mr. Rafael Bosch. Its organization meeting was held September 10, 1940, at the headquarters of the Inter-American Commercial Arbitration Commission, 8 West 40th Street, New York City, and the following resolution was adopted at that time:

> Upon motion duly made, seconded and unanimously carried, it was *Resolved*, That a vote of thanks be given to the American Arbitration Association, through Mr. Walter J. Derenberg, for their help and for

the use of their quarters to hold the meetings of the Association; and it was further

Resolved, That the said American Arbitration Association and the Inter-American Commercial Arbitration Commission be notified of the action of the meeting adhering to their activities on arbitration and conciliation, for which purpose this Association has created a standing committee, and that said Committee cooperate with and aid said American Arbitration Association as far as it can.

In accordance with this resolution, an Arbitration Committee has been appointed, whose members are: Victor M. Marin, Chairman; Raphael H. Beauduy and Luis V. Rivera. Rafael Bosch, President, Pan American Lawyers Association, and Pedro Gotay, Secretary of the Association, are members *ex-officio.*

Special Columbus Day Broadcast. A hemisphere-wide short-wave broadcast on inter-American arbitration over Station WRCA, New York, was one of the features of Columbus Day. David E. Grant of Pan American Airways, member of the Inter-American Commercial Arbitration Commission, was the speaker.

A Three-Cornered Dispute. In a controversy recently referred to the Commission, a complaint was filed by the South American purchaser of machinery against a United States manufacturer. While negotiations to obtain the consent of the manufacturer were pending, complaint was filed by a shipper in the United States against the same South American purchaser, involving the same merchandise. The purchaser had protested first to the shipper who had, on his own initiative and to satisfy the customer, agreed to exchange a part of the machinery. This the shipper had done and had shipped the substitute part on the understanding that the unsatisfactory part would be returned to him. The purchaser, however, still dissatisfied, notwithstanding the substitute part, wishes to return the whole machine, filed his complaint against the manufacturer and meanwhile refuses to return the substitute part to the shipper.

It frequently happens in fights that an innocent bystander gets injured. This would seem to be, figuratively, the case of the shipper, who finds himself damaged because of a dispute between two of his customers.

ARBITRATION LAW

JURISDICTION OVER THE NON-RESIDENT IN ARBITRATION PROCEEDINGS *

BY

LIONEL S. POPKIN AND LESLIE A. JACOBSON †

SETTLEMENT of disputes by arbitration, the businessman's device to avoid the delays and complexities of more traditional tribunals, may yet be rendered impotent where parties to the agreement are of diverse residence—and ironically enough, through the rigor of the procedural law arbitration practice was designed to ameliorate. Specifically, may a party to an arbitration agreement, a non-resident of the state where the arbitration is to be held,[1] refuse to arbitrate and, since process cannot ordinarily be served outside the state, flout his agreement by remaining without the jurisdiction?

Before coming to grips with this problem, we should recognize that the non-resident, unwilling to submit to arbitration, may shrewdly shape his conduct to the law of his state. If his state lacks an arbitration statute and is openly hostile to arbitration proceedings, the commencement of the arbitration in another state may be the signal for the hurried commencement by him of an action in the courts of his own state, to which the agreement for arbitration or the pendency of the arbitration proceeding in the other state will afford no defense.[2] Indeed, so in-

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[1] The determination of the state of arbitration, where the agreement itself is silent, ordinarily involves an interpretative, not a jurisdictional, question; only a flagrantly incorrect decision will be regarded as a jurisdictional error. Matter of Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 169 N. E. 386 (1929), *app. dis.*, 282 U. S. 808, 51 Sup. Ct. 104 (1930).

[2] Vitaphone Corporation v. Electrical Research Products, Inc., 166 Atl. 255, 167 Atl. 845 (Del. Ch. 1933). Pursuant to an agreement to arbitrate future controversies, the matter had been actually submitted to arbitration in New York at the request of the plaintiff in the instant action; but before the award, the plaintiff requested the arbitrators to withdraw and instituted

transigeant may this hostility be that even an award in the arbitration proceeding when sued upon in the state of the non-resident may be annulled on the now firmly entrenched doctrine that the arbitration provision relates to the remedy, a matter governed solely by the *lex fori*.[3] These attacks go to the heart

the present suit in Delaware. The defendant pleaded the New York Arbitration Law as a defense, urging it was entitled to full faith and credit. Holding that arbitration was a matter of remedy, governed by the *lex fori*, the court declared the arbitration agreement not binding in Delaware. The case is discussed in (1933) 33 COL. L. REV. 1440. On the remedial nature of arbitration proceedings, New York courts, before the enactment of the Arbitration Law, entertained a similar view. *Cf.* Meachem v. Jamestown F. & C. R. R., 211 N. Y. 346, 105 N. E. 653 (1914). Today, the once burning question whether arbitration is a matter of "remedy" or "substance" seems, at least in New York, purely academic. See Meachem v. Jamestown F. & C. R. R., *supra*, Matter of Berkovitz v. Arbib & Houlberg, 230 N. Y. 261, 130 N. E. 288 (1921). The issue was ably discussed in Heilman, *Arbitration Agreements and the Conflict of Laws* (1929) 38 YALE L. J. 617.

Courts will stay an action commenced in a state which has an arbitration statute in disregard of an agreement to arbitrate without the state. (See Matter of Interocean Food Products, Inc., 206 App. Div. 426, 201 N. Y. Supp. 536 (1st Dep't. 1923); *cf.* Estate Property Corp. v. Hudson Coal Co., 132 Misc. 590, 230 N. Y. Supps. 372 (Sup. Ct. 1928), *aff'd*, 225 App. Div. 798, 232 N. Y. Supp. 828 (1st Dep't. 1928). In a few states parties have been ordered to submit to arbitration without the state. See *e.g.* Nippon Ki-Ito Kaisha v. Ewing Thomas Corporation, 313 Pa. 442, 170 Atl. 286 (1934); Katakura & Co. Ltd. v. Vogue Silk Hosiery Co., 307 Pa. 544, 161 Atl. 529 (1932), a remedy which the New York courts have refused to grant [Matter of California Packing Company, 121 Misc. 212, 201 N. Y. Supp. 158 (1923); Matter of Interocean Food Products, Inc., *supra;* see Kelvin Engineering Co. v. Blanco, 125 Misc. 728, 210 N. Y. Supp. 10 (1926)] and are unlikely to grant in the future. See Fraenkel, *The New York Arbitration Law* (1932) 32 COL. L. REV. 623, 631. These cases indicate, moreover, that the relation of the parties or of the contract to the local or foreign jurisdiction is of no moment [see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 922]. The federal courts are in accord with the New York cases. The Silverbrook, 18 F. (2d) 144 (E. D. La. 1927); The Beechwood, 35 F. (2d) 41 (S. D. N. Y. 1929).

[3] This was the situation in Shafer v. Metro-Goldwyn-Mayer Distributing Corporation, 36 Ohio App. 31, 172 N. E. 689 (1929) discussed in (1930) 30 COL. L. REV. 1198, (1930) 40 YALE L. J. 302, (1931) 29 MICH. L. REV. 623. Again the doctrine that arbitration was remedial was the basis of decision; accordingly in Ohio, then without an arbitration statute, the arbitration agreement was viewed merely as a common law arbitration contract, as a matter of law revocable and as a matter of fact revoked by the Ohio resident's refusal to arbitrate in New York. The court's equivalence, of refusing to arbitrate and revoking the arbitration agreement, has been rightly criticized. (1931) 29 MICH. L. REV. 623.

of the arbitration provision; they proceed, not from any jurisdictional defect in the foreign arbitration proceeding, but from a deep-seated antagonism to settlement of disputes by arbitration. But our problem, here, is not with such objections;[4] it is with the jurisdictional attack on the service of initiating process, an attack which—irrespective of the policy of the non-resident's state—will, if valid, survive to defeat even a judgment on an arbitration award otherwise entitled to be enforced under the full faith and credit mandate of the Constitution.[5]

That problem, though it has, as yet, received surprisingly meager treatment by the courts, must rise to plague lawyers time and again. Its existence creates a task ultimately for the legislature or the rules committees of associations under whose auspices arbitrations are conducted, and immediately for the draftsman of the agreement to fashion a clause equal to the exigency.

I

The constitutional privilege of a non-resident to remain immune from the process of another state in an action or proceeding

[4] The feasibility of enforcing arbitration agreements against recalcitrant non-residents is not discussed in this paper. It has been the target of a strong, if somewhat heated, attack. (Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding* (1933) 46 HARV. L. REV. 1258; Phillips, *Arbitration and Conflict of Laws: A Study of Benevolent Compulsion* (1934) 19 CORN. L. Q. 197.) Phillips has also suggested that arbitration within New York may represent a grave inconvenience and disadvantage to non-residents, imposed on them through the greater bargaining power of large New York commercial houses. But the alternative to a New York arbitration—suits within the jurisdiction of the non-residents—creates for the New York concern not only a similar inconvenience, perhaps more readily bearable, but also a marked disadvantage: the scales may be more heavily weighed against a New York concern before a local jury in other states than against a non-resident arbitrating in New York. Compare the buyer's device of rejecting goods and securing local jurisdiction by attachment. See LLEWELLYN, CASEBOOK ON THE LAW OF SALES (1930) 648.

[5] If the award is merged into a judgment, the judgment will be entitled to full faith and credit by the courts of sister states, whatever their attitude or policy toward arbitration. Lorenzen, *Commercial Arbitration—Enforcement of Foreign Awards* (1935) 45 YALE L. J. 39, 56; *cf.* Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641 (1908); Teel v. Yost, 128 N. Y. 387, 28 N. E. 353 (1891); Morris v. Douglass, 237 App. Div. 747, 262 N. Y. Supp. 712 (1933).

demanding a money judgment [6] may be waived no less before than after the commencement of proceedings. Thus a non-resident party may, in advance of any litigation, consent that a state exercise jurisdiction over him; [7] but if the consent is based upon the prior fulfillment of certain conditions, jurisdiction is achieved only if the conditions are faithfully fulfilled.[8]

It is in the doctrine of consent that the solution of the problem has been and must be found. But because arbitration agreements are as various as the ingenuity and imagination of the draftsman, the doctrine requires examination in the light of each particular agreement and of the method used to invoke the arbitration provision.

II

Confining the discussion to an arbitration to be held in New York, there are four typical steps instituting, or preliminary to, an arbitration proceeding: (1) Irrespective of the precise form of the arbitration agreement, a motion may be made pursuant to Section 1450 of the Civil Practice Act for an order compelling arbitration; (2) the arbitration agreement may provide for arbitration under the rules of a particular code or association, for example, the American Arbitration Association, which may simply provide for the sending of a written notice demanding arbitration; (3) the arbitration agreement may provide that each party appoint an arbitrator, and upon the failure or refusal of one to act, either the single arbitrator may determine the controversy, or a second arbitrator is to be appointed by a named association, for example, the Chamber of Commerce of the State of New York; the aggrieved party generally sends a written notice of his selection with a request that the other party appoint its arbitrator and if there is no response, the arbitration proceeds under the aegis of the single arbitrator or of the arbitrators chosen by the aggrieved party and by the named association, the

[6] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

[7] See Wilson v. Seligman, 144 U. S. 41, 44, 12 Sup. Ct. 541 (1891); DeDood v. Pullman Co., 57 F. (2d) 171 (C. C. A. 2d, 1932); Pope v. Heckscher, 266 N. Y. 114, 117, 194 N. E. 53 (1934); RESTATEMENT, CONFLICT OF LAWS (1934) § 81; SCOTT, FUNDAMENTALS OF PROCEDURE, 39 *et seq.*; *cf.* Neirbo Company v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 Sup. Ct. 153 (1939); Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 60 Sup. Ct. 215 (1939).

[8] DeDood v. Pullman Co., 57 F. (2d) 171 (C.C.A. 2d, 1932).

arbitrators sending a notice of hearing to the recalcitrant party; and (4) irrespective of the precise form of the arbitration agreement, a party may, pursuant to Section 1458 (2) of the Civil Practice Act, send a notice of intention to arbitrate, which may or may not at the same time constitute a demand that the other party proceed to arbitration.

Other forms of arbitration agreements and modes of commencing arbitration proceedings may well suggest themselves, but the four situations visualized will raise most of the problems likely to be encountered in the institution of arbitration proceedings against a non-resident. In the light of these four situations, the decided cases must be interpreted.

III

The law of New York on the effect of extraterritorial service of a notice to compel arbitration must be based on an accurate appraisal of the opinion and decision of the Court of Appeals in *Gilbert v. Burnstine*.[9] Before that case, in *Skandinaviska Granit Aktiebolager v. Weiss*,[10] a New York suit on a judgment by a Swedish court was dismissed because the service of a notice, demanding that the defendant appoint its arbitrator and arbitrate in Sweden, was served in New York. Though the contract was made in Sweden and the notice was served without Sweden in conceded compliance with Swedish law, the court rigidly invoked the principle that *in personam* jurisdiction over non-residents could only be achieved by service within the state.[11] That case was followed by the Appellate Division in its decision in *Gilbert v. Burnstine*,[12] which the Court of Appeals reversed.

[9] 255 N. Y. 348, 174 N. E. 706 (1931).

[10] 226 App. Div. 56, 234 N. Y. Supp. 202 (2d Dep't. 1939).

[11] It has been suggested that the case may be distinguished from Gilbert v. Burnstine, 255 N. Y. 348, 174 N. E. 706 (1931), because the contract, though made in Sweden, did not provide for arbitration in, and pursuant to, the law of Sweden. [Lorenzen, *Enforcement of Foreign Awards* (1935) 45 YALE L. J. 39, 60]—a suggestion lacking persuasive force in view of the practical interpretation of the contract by the *defendant* in instituting a prior arbitration *in Sweden* on another controversy under the same contract. [*Cf.* Matter of Marchant v. Mead-Morrison Mfg Co., 252 N. Y. 284, 169 N. E. 386 (1929), *app. dis.*, 282 U. S. 808, 51 Sup. Ct. 104 (1930).] In accord with the *Skandinaviska* case is United Artists Corporation v. Gottesman, 135 Misc. 92, 236 N. Y. Supp. 623 (1929).

[12] 229 App. Div. 170, 241 N. Y. Supp. 54 (1st Dep't. 1930), criticized in STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 723 *et seq.*

In the *Gilbert* case, the agreement provided for "arbitration at London pursuant to the arbitration law of Great Britain". Service was made on defendants in New York (a) of a written notice to appoint an arbitrator with the admonition that in default plaintiff would apply to an English court for appointment, (b) of a so-called "originating summons" directing defendant to appear before a Master in London for the appointment of a arbitrator, (c) of a notice requiring defendants to furnish relevant documents in London, and (d) of a notice of the arbitration hearing. Defendants, in the comfortable belief into which they were no doubt lulled by the *Skandinaviska* case, disregarded all the notices. As the complaint alleged that each of the notices was served upon defendants in New York in compliance with the law of Great Britain and the case arose on a motion to dismiss, these allegations, for the purpose of the court's decision, stood admitted.[13] The only issues for decision were whether the arbitration clause in the contract constituted a consent to be governed by the laws of Great Britain respecting extraterritorial service of the notices, and if that were so, whether the contract was against public policy. The Court of Appeals held that there was such consent and that the contract was not against public policy. The case, of course, did not decide the scope of the statutes of Great Britain;[14] that was left for the trial. Nor did it throw light on the meaning to be accorded to the New York statutes. This much, however, is a necessary implication of the case: an agreement to arbitrate in New York pursuant to the arbitration law of New York is a consent to be governed by the statutes of New York and, provided the law of New York authorizes, to accept service of notices and processes in connection with the arbitration proceeding outside the state.

The transition from the general statement of *Gilbert v. Burnstine* to the particular situation of the New York statute was made, not altogether satisfactorily, in *Matter of Heyman Inc. v. Cole.*[15] The agreement there provided for "arbitration in New York in the usual manner pursuant to the custom of the Tanners' Council". The record did not disclose the customs, if any, of the Tanners' Council for the institution of an arbitration

[13] See Pope v. Heckscher, 266 N. Y. 114, 117, 194 N. E. 53 (1934).

[14] 1 CHAFEE AND SIMPSON, CASEBOOK ON LAW OF EQUITY, 552, contains a short summary of the arbitration statutes of Great Britain.

[15] 242 App. Div. 362, 275 N. Y. Supp. 23 (1st Dep't. 1934).

proceeding and, as the aggrieved party made an application to the court for an order directing arbitration, no reliance was apparently placed on any custom. The purchaser in default was a Maine corporation not doing business in New York. None the less, the seller, upon the purchaser's refusal to arbitrate, served a petition for an order directing arbitration pursuant to Section 3 of the former Arbitration Law, to which Section 1450 of the Civil Practice Act traces its origin, on the purchaser's president *in New York City*. Section 3 provided that the service of the notice of motion to compel arbitration "shall be made in the manner provided by law for personal service of a summons". The purchaser's motion to dismiss the petition was based on the ground that Section 3 had not been complied with and, even if complied with, was ineffective to obtain jurisdiction over it since it was a foreign corporation not doing business in New York. On the authority, primarily, of *Gilbert v. Burnstine*, the court, one judge dissenting, denied defendant's motion. The court's opinion, far from clarifying the New York law, introduced a new source of confusion. The gist of the court's opinion is found in the following:

> "Parties to a contract may confer jurisdiction by consent. (*Gilbert v. Burnstine, supra; Wilson v. Seligman*, 144 U. S. 41; *DeDood v. Pullman Co.*, 57 F. [2d] 171.) (See, also, § 96 of the Restatement of the Conflict of Laws by the American Law Institute [Proposed Final Draft, No. 1].) The authorities are in accord that such a contract is irrevocable to the extent that one of the parties, without the consent of the other, cannot deprive it of its enforcibility. (*Matter of Zimmerman v. Cohen*, 236 N. Y. 15.)
>
> "Where a party, in advance of any litigation or arbitration, agrees that in the event of such proceeding it shall be subject to foreign process, then that party will not be permitted to repudiate such agreement. Jurisdiction of the person of the parties is here conferred by consent." [16]

This language, distressingly vague, is open to two interpretations: (a) The arbitration agreement in itself is an unconditional consent to the jurisdiction of the New York court. By its mere execution, the non-resident has submitted itself to the jurisdiction of the New York tribunals. Process to originate the New York proceeding has thus been dispensed with. Only a notice of the proceeding to advise of its impendency is essential. Under this interpretation, the notice of motion under Section 3

[16] 242 App. Div. 362, 364, 275 N. Y. Supp. 23 (1st Dep't. 1934).

functioned merely as a notice of the hearing on the motion; (b) The arbitration agreement is merely a consent to submit to the procedural machinery of the New York Statutes. So far, this is in line with the *Gilbert* case, which the court cited as authority. On this hypothesis, however, since the service made on the officer in New York would ordinarily be no more effective than service made without the state,[17] the language of Section 3 of the Arbitration Law—"in the manner provided by law for personal service of a summons"—must relate merely to the physical method and mechanics of service, and not to the substantive limitations imposed by constitutional law.

Whichever interpretation one may choose, the opinion and decision are open to sound criticism. The interpretation under (a) is not in accord with *Gilbert v. Burnstine.* True, it has the virtue of taking a hard practical view of the non-resident's execution of an agreement stipulating solution of controversies by arbitration: the agreement means that the non-resident *will* arbitrate, and all the nice jurisdictional objections are extinguished in that consent. But that interpretation, though its appeal must be admitted, reads more into the execution of the agreement in the *Heyman* case than is warranted. Conceivably, such an agreement could be made;[18] it would have to call for explicit acknowledgment of the jurisdiction of the New York tribunal. The agreement in the *Heyman* case, and the usual arbitration agreements,[19] fall far short of that.

The interpretation under (b) is equally objectionable.

(1) The wording of Section 3 has its counterpart in other Sections of the New York Statutes.[20] A reasonable interpretation of such Sections does not imply that service on a non-resident is permissible thereunder when made without the state or when made within the state upon an officer of a non-resident corporation not doing business within the state. In brief, cognate wording in other statutes does not suggest that the phrase is directed

[17] Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579 (1915).

[18] Compare the confession of judgment cases [Teel v. Yost, 128 N. Y. 387, 28 N. E. 353 (1891)].

[19] See Matter of General Hide & Skin Corp. (Schmoll Fils Associated, Inc.), N. Y. L. J., June 21, 1939, p. 2869 (N. Y. Co. Spec. Term I). The contention that the arbitration agreement—typical in form—by its very execution conferred jurisdiction was there denied.

[20] *Cf. e.g.* N. Y. Civ. Prac. Act § 655.

to the mechanics, without consideration of the substantive limitations, of service.

(2) Section 235 of the Civil Practice Act provides that where a warrant of attachment, granted in the action, has been levied against defendant's property within the state, the summons may be served without an order upon a defendant without the state "in the same manner as if such service were made within the state".[21] Thus, where the statute contemplates service without the state, under mechanics of service prevailing within the state, the statute has left nothing to implication. *Matter of Heyman* in effect, therefore, distorted Section 3 of the Arbitration Law to read:

> "service of the notice of motion shall be made within the state in the manner provided by law for personal service of a summons, or without the state in the same manner as if such service were made within the state."

Such an interpretation of Section 3 may have been desirable, but it scarcely seems to have been warranted by the sparse and explicit language in which it is couched.

(3) The manner of making personal service on a foreign corporation is provided in Section 229 of the Civil Practice Act. That Section directs that personal service on a foreign corporation "must be made by delivering a copy thereof, *within the state*" on specified officers or directors. Read into the statute, of course, is the limitation that the corporation must be doing business here.[22]

(4) Finally, earlier dicta on the scope and meaning of Section 3 of the Arbitration Law runs counter to the court's view in *Matter of Heyman v. Cole*.[23]

[21] This section was interpreted in Howard Converters, Inc. v. French Art Mills, Inc., 273 N. Y. 238, 7 N. E. (2d) 115 (1937), (1938) 38 COL. L. REV. 340.

[22] Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917).

[23] See Finsilver, Still & Moss v. Goldberg, Maas & Co., 253 N. Y. 382, 387, 171 N. E. 579 (1930) in which the court, directing its remarks to § 3 of the now superseded Arbitration Law, commiserated with the "hapless . . . . plight of a party to a controversy if his adversary was a non-resident, without the jurisdiction. The process of the court could not reach the recalcitrant opponent to coerce response to a petition that the arbitration should proceed"; Skandinaviska Granit Aktiebolaget v. Weiss, 226 App. Div. 56, 59, 234 N. Y. Supp. 202 (2d Dep't. 1929), where the court stated that the language of § 3 of the Arbitration Law "excludes such idea of service without the State."

Seemingly, therefore, *Matter of Heyman* goes beyond *Gilbert v. Burnstine.* The *Gilbert* opinion is clear that an arbitration agreement constitutes a consent that jurisdiction may be obtained in the manner provided by the statutes of the state pursuant to which the arbitration was to be held. *Matter of Heyman,* under the first interpretation suggested above, indicates that an agreement, though similar in wording and substance to that in the *Gilbert* case, in itself confers the jurisdiction. This difference was pointedly observed by the dissenting opinion in *Matter of Heyman.*

IV

Against this small and still unsatisfactory body of authority, the four typical situations proposed earlier may be viewed.

1. *A motion to compel arbitration under Section 1450 of the Civil Practice Act.*

Section 1450 provides that the service of the notice of motion to compel arbitration

> "shall be made in the manner provided by law for personal or substituted service of summons".

Under the first interpretation of *Matter of Heyman,* the statute presents no difficulty; the agreement itself confers jurisdiction, the notice under the statute functions merely to give warning of the hearing.

Under the second interpretation of *Matter of Heyman* and under the *Gilbert* case, if the agreement is clear that arbitration is to be held pursuant to the laws of New York, the question is reduced to an interpretation of the statute. Under the statute, must service of the notice of motion be made in this state?

Under the second interpretation of *Matter of Heyman* suggested above this Section should permit service without the state. The argument would be as follows: the Section, like Section 3 of the Arbitration Law, is directed only to the mechanics of service; it contains no substantive or geographical limitations. If the service, accordingly, is made on a corporation, the statute is complied with if service is made on a proper officer or director; if the non-resident is an individual, it must be served on him personally or by substituted service in precisely the same fashion as substituted service would be effected within the state.

To state the argument is to raise a host of complications. For example, service within the state may be made on a domestic

corporation or on a foreign corporation doing business in New York, by serving the summons within the state on a person designated for the purpose by a certificate filed with the Department of State, or if such designation is not in force, with the Secretary of State.[24] May proper service, therefore, be made under the statute without the state by serving the Secretary of State of, or a statutory designee in, a foreign state? [25] Similarly, may substituted service be made without the state precisely as it would have been made within the state? Section 230 of the Civil Practice Act—the statutory provision for substituted service—envisages service within the state; to invoke its directions for service without the state would create unlimited complexities and difficulties.[26] Indeed, the slight difference in language of

[24] See N. Y. Civ. Prac. Act § 229 (2) and N. Y. Gen. Corp. Law § 217; also N. Y. Civ. Prac. Act § 228 (9) and N. Y. Stock Corporation Law § 24.

[25] *Cf.* Howard Converters, Inc. v. French Art Mills, Inc., 273 N. Y. 238, 7 N. E. (2d) 115 (1937), (1938) 38 Col. L. Rev. 340.

[26] Assuming that the notice of motion under § 1450 may be served without the state, an interesting question as to its effect is raised. That the proceeding to compel arbitration is separate and independent of, though related to, the arbitration proceeding has been repeatedly recognized. See Hosiery Manufacturers Corp. v. Goldston, 238 N. Y. 22, 25, 143 N. E. 779 (1924); Matter of Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 292, 169 N. E. 386 (1929); Finsilver Still & Moss v. Goldberg, Maas & Co., 253 N. Y. 382, 390, 171 N. E. 579 (1930); Matter of General Hide & Skin Corporation (Schmoll Fils Associated, Inc.), N. Y. L. J., June 21, 1939, p. 2869 (N. Y. Co. Spec. Term I). That being so, one may question how the gap between jurisdiction in the proceeding to compel arbitration and jurisdiction in the arbitration proceeding itself—is to be bridged. It would be awkward, indeed, if, having obtained an order compelling arbitration, a party could give it efficacy only through the remedy of contempt for its disregard—a remedy of doubtful, if any, value against a non-resident. More reasonable is a rationale, which, though recognizing the independent stature of the two proceedings, relates the termination of the one—by an order compelling arbitration—to the commencement of the other; notice of hearing in the arbitration proceeding would still be necessary (see N. Y. Civ. Prac. Act § 1454), but jurisdiction in the second proceeding—the arbitration proceeding—would have been obtained by the successful termination of the proceeding to compel arbitration. [*Cf.* Marchant v. Mead-Morrison Mfg. Co., 29 F. (2d) 40 (C. C. A. 2d, 1928), *cert. denied*, 278 U. S. 655, 49 Sup. Ct. 179 (1928).] Under this theory, the independent nature of the two proceedings would still have justification, if only to compel a preliminary but final determination of the existence of an arbitration agreement before the arbitration proceeding is commenced. (Matter of Marchant v. Mead-Morrison Mfg. Co., *supra; cf.* Finsilver, Still & Moss v. Goldberg, Maas & Co., *supra*).

Section 3 of the Arbitration Law and Section 1450 of the Civil Practice Act, through the insertion of the words "or substituted" before the words "service of summons", affords additional proof that extraterritorial service is not within the purview of the Section. When Section 1450 was enacted,[27] the method of substituted service was clearly restricted, under the New York statutes, to service on resident individuals or corporations.[28] The legislative intention with respect to the general purview of Section 1450 should be ascertained, it would seem, by the scope of the statutes prevailing when Section 1450 was enacted. In this view, it is of no moment that recently the legislature authorized a new form of substituted service on non-resident individuals doing business in New York.[29] When Section 1450 was originally enacted, substituted service meant service on residents only, and the addition of the words "or substituted" in the transition from Section 3 of the Arbitration Law emphasized the legislative intention that Section 1450 was to be confined to residents.[30]

[27] N. Y. Laws 1937, c. 341.

[28] Section 230 of the N. Y. Civil Practice Act is expressly confined to domestic corporations, having a president or treasurer within the state, and to a natural person "residing within the state." Service on non-resident motorists, through service on the Secretary of State (see N. Y. VEHICLE AND TRAFFIC LAW § 52) is a form of substituted service, though not commonly denominated as such. In any event, this widely divergent field can have no bearing on the interpretation of the arbitration statutes.

[29] N. Y. Laws 1940, c. 99, adding § 229-b to the N. Y. Civil Practice Act, discussed in (1940) 53 HARV. L. REV. 1061. Service on non-resident individuals doing business in New York in an action arising out of such business is authorized by service of summons and complaint on a person in charge of the New York office and of a copy of the summons and complaint, together with notice of service on the New York representative, on the non-resident by registered mail, return receipt requested. In lieu of service of the copies by registered mail, service thereof may be made personally on the non-resident without the state.

[30] A Special Committee on Arbitration of the Association of the Bar of the City of New York had been active in urging recodification of the arbitration provisions of the old Arbitration Law and of the Civil Practice Act. In an article written by the chairman of that committee, it was stated that the addition of the words "or substituted service," then only proposed, was made "because there seems to be no good reason why arbitration proceedings may not be brought against a *resident* of the state in the same manner in which an action may be commenced." Nordlinger, *Proposed Consolidation of New York Statutes Relating to Arbitration* (1937) 1 ARB. J. 100, 102.

Without contradiction of this theory of general interpretation, it may be still argued that statutes enacted subsequent to Section 1450 enlarging the scope of service, such as the recent amendment with respect to non-resident individuals doing business in New York, will enlarge the permissible methods of service under Section 1450 *pro tanto*. Thus the general language of Section 1450 will embrace the new modes of "personal" or "substituted" service defined by subsequently enacted statutes. Such new statutes, however, cannot afford a criterion for measuring the scope of Section 1450 as originally enacted or indicate the permissibility of service not specifically provided by the new statutes.

On the other hand it may be urged, but less plausibly, it is believed, that the words "substituted service", as used in Section 1450 relate only to that type of service familiarly denominated "substituted"—that is, service authorized by Section 230 of the Civil Practice Act—and does not encompass every case where service is effected on someone other than the defendant in the action.[31] Should this interpretation prevail, new modes of service, sometimes characterized as substituted, such as that provided by the recently enacted Section 229 (b) of the Civil Practice Act, will not be available in proceedings to compel arbitration.

The conclusion seems necessary that whatever interpretation *Matter of Heyman* accorded Section 3 of the Arbitration Law, Section 1450 of the Civil Practice Act contemplates service only within the state. Under the *Gilbert* case, an agreement calling for arbitration within New York, will, accordingly, not permit service on non-residents.[32] This conclusion may have an excep-

[31] This interpretation would exclude such other types of service—*e.g.*, that authorized by N. Y. Vehicle and Traffic Law § 52 or by the recent § 229 (g) of the N. Y. Civil Practice Act—as might conceivably be regarded as "substituted." The choice of § 52 of the Vehicle and Traffic Law—the non-resident motorist section—is perhaps an unhappy one, since it never could come into play in connection with consensual arrangements like arbitration agreements; none the less because it was in force when § 1450 was enacted it serves to clarify the point made in the text.

[32] See Matter of Lehman v. Ostrovsky, 264 N. Y. 130, 190 N. E. 208 (1934), where the question was whether a domestic buyer could compel a local agent for a foreign seller to proceed with arbitration. The Record on Appeal indicates that the court at Special Term ventured the opinion that "To construe the agreement as the agent urges would make it binding only on the buyer, for the seller cannot be brought into the jurisdiction without his consent." (Record on Appeal, Fols. 52-53.)

tion, made necessary by the recent Section 229 (b) of the Civil Practice Act permitting service on non-resident individuals doing business in New York.[33] If this amendment survives constitutional attack—on which there may be doubts [34]—and if the word "substituted" in Section 1450 is not confined to the type of service authorized by Section 230 of the Civil Practice Act, non-resident individuals or partnerships doing business in New York may be compelled to submit to arbitration in New York.

2. *Arbitration under the rules of a named association.*

An early decision that a court order was essential to the commencement of an arbitration proceeding [35] was quickly annulled by legislative amendment to the old Arbitration Law,[36] so that today no doubts attend the propriety of the commencement of arbitration without court order.[37] Of course, any special provisions of the arbitration contract must be followed and must control. For instance, if the contract prescribes arbitration under the rules of an association, the procedure outlined in the rules will control. Where the rules provide that an arbitration may be commenced by the mailing or service of a notice on the other party, and there is no restriction, express or implied, that the procedure is confined to residents of the state, there is no

[33] N. Y. Laws 1940, c. 99, adding § 229 (b) to the N. Y. Civil Practice Act. See note 28, *supra*.

[34] Flexner v. Farson, 248 U. S. 289, 39 Sup. Ct. 97 (1919), where the court held that jurisdiction could not be acquired over a non-resident individual by substituted service, similar to that provided by § 229 (b), because the power to exclude, the only jurisdictional basis discussed by the court, could not be constitutionally exercised against non-resident individuals (U. S. CONST. ART. IV, § 2). But other basis of jurisdiction—the exercise of the state's police power—has justified service on non-resident motorists [Hess v. Powlaski, 274 U. S. 352, 47 Sup. Ct. 632 (1927); *cf.* Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30 (1916); but *cf.* Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259 (1928)] and against non-resident individuals selling securities in the state. Henry L. Doherty & Co. v. Goodman, 249 U. S. 623, 55 Sup. Ct. 553 (1935), (1935) 48 HARV. L. REV. 1433. A similar necessity, aggravated today by the frequency of interstate transactions, may operate to sustain § 229 (b). See Scott, *Jurisdiction over Non-residents Doing Business within a State* (1919) 32 HARV. L. REV. 871, 888 *et seq.*

[35] Matter of Bullard v. Grace Co., 240 N. Y. 388, 148 N. E. 559 (1925).

[36] ARBITRATION LAW § 4-a (N. Y. Laws 1927, c. 352), discussed in Finsilver, Still & Moss v. Goldberg, Maas Co., 253 N. Y. 382, 171 N. E. 579 (1930).

[37] See N. Y. CIV. PRAC. ACT § 1458.

problem and service may be made by mail or personally outside the state. A question does arise, however, where the rules are vague.

The American Arbitration Association rules, for example, provide that:

> "Any party to a written arbitration agreement, or to a written contract which contains an arbitration clause, providing for arbitration under these Rules, shall, when a controversy arises thereunder, file with the clerk of the Tribunal having jurisdiction under these Rules a copy of such agreement or clause and of the written demand for arbitration that he has made thereunder upon the other party thereto."

The Association interprets this provision as permitting the commencement of an arbitration proceeding by "writing a letter to the other party demanding arbitration".[38] As there is no limitation respecting the residence of the other party, the provision in the rules, though clarification would seem desirable, is susceptible of the interpretation that the arbitration may be commenced by the service of a demand within or without the state.

In this respect the rules of the Silk Association of America are specific. They provide:

> "Any party to an agreement for arbitration pursuant to these Rules consents that any papers, notices or process necessary or proper for the institution or prosecution of an arbitration proceeding hereunder, including appeals in connection therewith, may be served upon such party by registered mail or by personal service within or without the State of New York or the United States of America, providing a reasonable time is allowed such party thereby to appear and defend."[39]

In each case, therefore, where an arbitration is to be held pursuant to the rules of a named association, the rules of such association will in the first instance control. If they permit the commencement of arbitration either by personal service or by mailing of a notice without the state, a New York resident should encounter no difficulty in acquiring jurisdiction over a nonresident. If the rules are silent or uncertain, then the New York resident may be relegated to the provisions of Section 1450 of the Civil Practice Act, with the attendant dangers of conflicting interpretations resulting from the *Gilbert* and *Matter of Heyman* cases.

[38] See Pamphlet COMMERCIAL ARBITRATION TRIBUNAL, issued by American Arbitration Association, p. 5.

[39] See ARBITRATION RULES OF THE SILK ASSSOCIATION OF AMERICA, INC., Rule 25.

3. *Arbitrators chosen upon the demand of the party seeking arbitration.*

If the agreement provides that a single arbitrator may act where the other party refuses to appoint an arbitrator, it may be urged that the demand for the appointment of the arbitrator is tantamount to and serves the function of a notice for the commencement of an arbitration proceeding. In such a case, the problem resolves itself into an interpretation of the meaning of the contract. As a substantial constitutional right is involved, it is doubtful whether courts will give to the demand for the appointment of an arbitrator so pervasive an effect. Should they deny its status as a method of originating an arbitration proceeding, the New York resident will be relegated to the procedure under Section 1450 of the Civil Practice Act.

The problem is in substance no different where, upon default of the non-resident to appoint an arbitrator, the agreement provides that a third person or association shall appoint the second arbitrator.

If the agreement, however, makes no provision for the appointment of a substitute arbitrator by a third person or for the sole jurisdiction of the single arbitrator appointed by the New York resident, the New York resident may be forced to make an application to court to compel a non-resident to appoint his arbitrator pursuant to the agreement. This introduces a new problem. The Civil Practice Act makes express provision for application to court to compel the appointment of an arbitrator, Section 1452 providing that if a party fails to avail himself of the contract method for the appointment of the arbitrator, then either party may make application to the Supreme Court for the designation and appointment of an arbitrator. That Section, itself silent on the method of commencing the proceeding for the appointment of an arbitrator, must be read in conjunction with Section 1459, which provides that

> "any application to the court, or a judge thereof, hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

As will be discussed more fully below in connection with the motion to confirm the award, the Civil Practice Act makes express provision for the service of a notice of motion on a party or attorney resident without the state. Under the *Gilbert* case, the arbitration agreement would constitute a consent to accept

service of the notice of motion at the residence of the party or his attorney, though without the state. To this conclusion may be opposed the argument that Section 1450 of the Civil Practice Act, which apparently contemplates only proceedings to compel arbitration against residents, strikes the tenor of the entire arbitration article, and that, while arbitrations voluntarily commenced or commenced without resort to the statute may involve non-residents as well as residents, the compulsory Sections of the statute are effective only with respect to the residents of this state.

But even if the notice of motion to compel the appointment of an arbitrator may, under the *Gilbert* case, be served outside the state, the question remains whether the service of that notice is sufficient, or whether a further step is required, to compel the commencement of the arbitration proceeding. The scheme of Article 84 of the Civil Practice Act clearly regards each as a separate and perhaps independent step.[40] But if Section 1450 requires service within the state, an incongruity is introduced by permitting the compulsory appointment of an arbitrator, though simultaneously denying the compulsory commencement of an arbitration proceeding against a non-resident. The peculiarity of this result is emphasized when it is recalled that under each Section a preliminary finding of the existence of a contract to arbitrate is essential, under Section 1459 the procedure seemingly being summary, under Section 1450 the right to trial by jury being preserved. But the requirements for different types of service, though at first blush apparently inconsistent, may be explained on the ground that rights less substantial are involved in the appointment of an arbitrator than in the compulsion actually to arbitrate. The statutory scheme, it may be argued, therefore, is to require procedure less formal in the one case than in the other.

Confronted with this situation, the courts of this state may, however, point to Section 1450 as the touchstone of interpretation for other Sections of Article 84. If they should hold that Section 1450 demands service within the state, they may hold that that Section marks the confines of other provisions of the Article, all of which should be read in association with each other. Section 1459, thus read, may, like Section 1450, be restricted to

[40] Relief under both provisions is often sought in a single petition.

service of the notice on a resident adversary,—the implications of the *Gilbert* case notwithstanding. This interpretation failing, the conclusion is compelled that the statute permits a resident to go through the futile effort of appointing arbitrators for a proceeding which cannot and may never be commenced. Yet, that conclusion is foreshadowed by the decision of a court at Special Term suggesting that the service without the state, under Section 1458 (2), of a notice of intention to arbitrate, though sufficient to compel the non-resident to raise the issue of the existence of the contract, did not operate to commence an arbitration proceeding.[41]

4. *Service of a notice of intention to arbitrate.*

Here, as with respect to the motion to compel the appointment of an arbitrator, the question is two-fold: (a) How must the notice be served? (b) What is the function and effect of the service of the notice?

(a) The method of service is provided in Section 1458 (2): "If a notice shall have been personally served" upon the other party of the intention to conduct the arbitration, such other party will be precluded from contesting the existence of a valid contract to arbitrate or the failure to comply therewith unless within ten days after the service, he makes a motion for a stay; so reads the statute. The nice distinction in language between this Section and the provision of Section 1450 is immediately emphasized. Here, the notice must be "personally served"; under Section 1450 the notice must be served "in the manner provided by law for personal or substituted service of a summons". The difference lends substance to an argument that the same kind of service is not required under both Sections. Even if Section 1450 circumscribes the service of the notice to compel arbitration with the mechanical and substantive limitations of the service of a summons, Section 1458, it could reasonably be urged, requires merely a delivery personally to the other party, whether this be within or without the state. And that is the conclusion of a court at Special Term in *Matter of General Hide & Skin Corporation (Schmoll Fils Associated, Inc.)*,[42] where it was held that the notice of intention to arbitrate was properly served at Rangoon,

[41] Matter of General Hide & Skin Corp. (Schmoll Fils Associated, Inc.) N. Y. L. J., June 21, 1939, p. 2869 (N. Y. Co. Spec. Term I).

[42] *Ibid.*

India. And certainly if *Matter of Heyman* justifies the conclusion that Section 1450 permits service without the state, service of the notice of intention under Section 1458 without the state is proper.

(b) *Matter of General Hide & Skin Corporation* (*Schmoll Fils Associated, Inc.*) also passed on the function of the notice under Section 1458.[43] There, as stated, the notice of intention to arbitrate was served personally on a non-resident seller at Rangoon, India. Within the ten day period the seller, appearing specially, moved to vacate the service of the notice. The buyer urged that the notice operated not merely to expedite the determination of the issuance of the contract to arbitrate, *i.e.* as a notice of intention under Section 1458, but also to commence the arbitration proceeding itself. The court at Special Term held that the notice, under Section 1458 (2), was properly served at Rangoon, India. When delivered personally at Rangoon, it was "personally served" within the statute. But the court refused to hold that the notice was effective to commence the arbitration proceeding, leaving for future determination the issue of the scope and purpose of the notice. The court's refusal to hold that the notice commenced the arbitration proceeding might well be construed to be tantamount to a holding that it did not operate for that purpose. If that is so, the arbitration proceeding could have been commenced against the non-resident party in Rangoon only if Section 1450 authorized service without the state.

Thus here, as with respect to a motion to compel the appointment of an arbitrator, the arbitration law of New York, as it

[43] The particularity required in the notice of intention to arbitrate under § 1458 (2), in order to escape constitutional objection, was discussed in Schafran & Finkel v. Lowenstein, 280 N. Y. 164, 19 N. E. (2d) 669 (1939), *reary. denied*, 280 N. Y. 687, 21 N. E. (2d) 196 (1939). See also Matter of Hesslein & Co. v. Greenfield, 281 N. Y. 26, 22 N. E. (2d) 149 (1939); Matter of Bernson Silk Mills v. Siegel & Co., Inc., 256 App. Div. 617, 11 N. Y. S. (2d) 74 (1939). The controversy culminated in an amendment to § 1458 (2), providing: "Such notice must state in substance that unless within ten days after its service, the party served therewith shall serve a notice of motion to stay the arbitration, he shall thereafter be barred from putting in issue the making of the contract or submission or the failure to comply therewith." (Laws 1939, c. 573). The entire question is reviewed in Nordlinger, *Twenty Years of Statutory Development in Arbitration in New York*, (1940) N. Y. U. LAW Q. REV. 517.

now exists, would seem to permit a resident to initiate a preliminary step in the arbitration proceeding, though denying to him the method of making effective the very substance of the agreement, the arbitration hearing itself. However curious this conclusion, it would seem to be the inevitable result of a consistent application of the doctrine of the *Gilbert* case. If the result appears unreasonable, the explanation would seem to lie in the perversity of the statute as presently drawn. However, it is possible, though not likely, that here again the considerations of statutory interpretation, which have been suggested in connection with the motion to compel appointment of an arbitrator, may be persuasive in delimiting the scope of service under Section 1458 (2) to the jurisdictional confines inherent in Section 1450.

V

With respect to the motion to confirm the award of the arbitrators, a question is raised in substance not dissimilar from that which we have considered in connection with the service of the notice to compel an arbitration proceeding. On two independent grounds it is believed that service of the notice of motion to confirm the award may be made without the state.

1. The motion to confirm the award is an integral part of the arbitration proceeding itself; it does not constitute an independent proceeding. If jurisdiction has validly been obtained in the arbitration proceeding, there would appear to be no constitutional requirement that jurisdiction be acquired anew for the purposes of the motion to confirm the award. Under Section 1459 of the Civil Practice Act, an arbitration is "a special proceeding of which . . . . the Supreme Court for the County in which one of the parties resides or is doing business, or in which the arbitration was held, shall have jurisdiction". Under Section 1461 of the Civil Practice Act, a motion to confirm the award must be made to the court "having jurisdiction as provided in Section 1459". Sections 1459 and 1461 read, as they must be, in conjunction with one another indicate clearly that the motion to confirm the award is part and parcel of the arbitration proceeding. This conclusion is confirmed by *Matter of Marchant v. Mead-Morrison Manufacturing Co.*,[44] where the motion to confirm

[44] 252 N. Y. 284, 169 N. E. 386 (1929), *app. dis.*, 282 U. S. 808, 51 Sup. Ct. 104 (1930).

the award was regarded as part of the arbitration proceeding itself.

2. Even if the application to confirm the award were deemed a separate proceeding, unrelated to and independent of the arbitration proceeding, the rule in the *Gilbert* case, when applied to the statutory provision for the service of notices of motion, would sanction the extraterritorial service of the notice.

Section 1461 of the Civil Practice Act provides that the notice of motion "must be served upon the adverse party or his attorney, as prescribed by law for service of a notice of motion upon an attorney in an action in the same court". Under Rule 20 of the Rules of Civil Practice express provision is made for service of the notice of motion at the residence of a party or an attorney, without express limitation whether the same be within or without the state.[45]

[45] Rule 20 of the RULES OF CIVIL PRACTICE provides:

"A notice or other paper in any action (other than a summons or other process, a paper to bring a party into contempt, or where the mode of service is specially prescribed by law) may be served on a party or an attorney *either by delivering it to him personally* or in the manner following: 1. On a party or an attorney, through the postoffice, by depositing the paper properly inclosed in a postpaid wrapper in a postoffice box regularly maintained by the government of the United States in the city, village or town of the party or the attorney serving it, directed to the person to be served at the address within the state theretofore designated by him for that purpose; or, *if such a designation has not been made, at his place of residence or the place where he keeps an office*, according to the best information which can be conveniently obtained."

A similar conclusion has been reached by an Illinois court in Sturges & Biven Mfg. Co. v. Unit Construction Co., 207 Ill. App. 74 (1917). There the parties entered into a submission to arbitrate an existing controversy under the laws of Illinois and provided that the award, when made, "may be filed in the Circuit Court of Cook County and judgment entered therein pursuant to the statute in such case made and provided". Thus the submission made express what is implied under the *Gilbert* case in an agreement to arbitrate under the laws of a particular state. The arbitration award was in favor of the plaintiff, who thereupon served on defendant a notice of motion for judgment on the award by delivering a copy of the notice to an officer of the defendant at its home office in St. Louis, Mo. The service was attacked. The Illinois Court held that "notice" in the statute did not mean legal process, and since the purpose of the statute was to avoid the vices and delays of a conventional law suit, it was not unreasonable thus to interpret "notice". The court further held that the service was not unconstitutional since the defendant, by signing the submission, "subjected itself to the jurisdiction" of the court in which, by the Illinois statutes, judgment could be entered.

VI

Escape from the difficulties encountered in acquiring jurisdiction over non-resident parties has frequently been sought through serving notices on resident parties acting as agents for the non-residents. As suggested above, under the recent amendment to Section 229 of the Civil Practice Act, non-resident individuals doing business in New York may possibly be compelled to arbitrate in New York through service on their resident agent. Furthermore, if the non-resident is a corporation and the resident agent, individual or corporate, qualifies by reason of its activities as its managing agent,[46] service on the resident agent will constitute effective service on the foreign principal.[47] But where the resident individual or corporation does not qualify as the foreign principal's managing agent, efforts to compel the agent to carry on the arbitration have failed,[48] unless the agreement clearly vested the agent with such authority and obligation.[49]

The abundance of problems created by an agreement providing simply for "arbitration in New York" should serve as telling warning that meticulous draftsmanship may be essential to assure an arbitration against a non-resident party. That necessarily presupposes a full appreciation of the uncertainties presently found in the New York statutes and the confused state of the decisions. The usual, cryptic phrase commonly employed in agreements—"arbitration shall be held in New York pursuant to the laws of New York"—is obviously inadequate assurance

[46] See N. Y. Civ. Prac. Act § 229 (3).

[47] Matter of Biddle P. Co., Inc. v. Yung Hsing Tr. Corp., 238 App. Div. 264, 264 N. Y. Supp. 157 (1st Dep't. 1933); Bersin v. Boath, Junior & Co., Lt., 198 App. Div. 344, 190 N. Y. Supp. 398 (1st Dep't. 1921); *cf.* Matter of General Hide & Skin Corp. (Schmoll Fils Associated, Inc.), N. Y. L. J., June 21, 1939, p. 2869 (N. Y. Co. Spec. Term I); Pennrich & Co., Inc. v. Juniata Hosiery Mills, 247 N. Y. 592, 161 N. E. 195 (1928); McKeon v. McGowan & Sons, 229 App. Div. 568, 242 N. Y. Supp. 700 (2d Dep't. 1930).

[48] Matter of Lehman v. Ostrovsky, 264 N. Y. 130, 190 N. E. 208 (1934) (though the agent had guaranteed the award); Matter of General Hide & Skin Corp. (Schmoll Fils Associated, Inc.), N. Y. L. J., June 21, 1939, p. 2869 (N. Y. Co. Spec. Term I).

[49] *Cf.* Rosenhirsch Co. v. Mei Loong Corp., N. Y. L. J., Feb. 15, 1940, p. 720 (N. Y. Co. Spec. Term I). In this situation, a neat problem will be created by an attempted revocation of the agent's authority before service is effected.

to compel the recalcitrant non-resident to arbitrate in New York. The certainty achieved by a provision explicitly recognizing the jurisdiction of local tribunals and the propriety of extraterritorial service is a small price to pay for the sacrifice of brevity. At bottom, however, clarification of Article 84 of the Civil Practice Act seems essential; to be of lasting value, it must be realized, not by piece-meal amendment, but by a careful revision in the light of the problems created by the non-resident party.

REVIEW OF COURT DECISIONS

BY

WALTER J. DERENBERG

NEW YORK COURT OF APPEALS

Innocent Misrepresentation as Ground for Preliminary Jury Trial of Issue of Existence of Arbitration Agreement. The appeal in the *Matter of Manufacturers Chemical Co., Inc.*, 19 N. Y. S. (2d) 171, April 1940, 4 ARB. JOURNAL 109, has been dismissed by the Court of Appeals, 28 N. E. (2d) 404 (1940).

The Appellate Division had decided that the issue of fraud or misrepresentation in the inducement of a contract was not to be left to the arbitrators, but was a matter to be tried preliminarily by the court or a jury.

SUPREME COURT, APPELLATE DIVISION

Termination of Arbitration Clause—Res Adjudicata. Appeal from an order granting a motion for a stay of an arbitration proceeding. Petitioner claimed that his employment contract with respondents was breached by the latter's wrongful discharge of the petitioner. The employment contract provided for arbitration of any difference which might arise thereunder. After his discharge, the petitioner asserted his claim for salary up to July 1, 1938, and an award in favor of the petitioner in the amount of $2,400 was rendered and confirmed.

Petitioner subsequently sought to compel arbitration of claims for additional salary from July, 1938, to July, 1939, and respondents moved for a stay under Sec. 1458, C. P. A. The Special Term granted the motion on the ground that a cause of action for damages for wrongful discharge under an employment contract is indivisible; that one recovery of damages is a bar to any subsequent recovery and, therefore, there was nothing to arbitrate.[1]

The Appellate Division, by a 3 to 2 decision, reversed the Special Term and held that the motion for the stay should be denied.

Taylor, J., writing for the majority, pointed out that there is no authority for a stay of an arbitration unless the opposing party has raised an issue as

[1] The decision of Special Term is reported in 4 ARB. JOURNAL 56.

to the making of, or compliance with, the contract to arbitrate. Concededly, such a contract had been made here. All matters of law, as well as of fact, raised by this motion were subject to determination of the arbitrators.

Close, J., in a dissenting opinion, stressed the point that the first arbitration award had the effect of *res adjudicata* and that no further arbitration could be had of an issue constituting part of a cause of action which is indivisible by law.

"At law such an action is indivisible and one recovery is a bar to any further action for damages. An award in arbitration has the same effect as a judgment in an action. As I read sub-division 2 of Section 1458 of the C. P. A., as amended, unless the defense that the agreement to arbitrate is *functus officio* is raised upon a motion to stay the arbitration, the defense is waived. By making the motion, the respondents, in effect, say that there is no longer in existence any agreement to arbitrate." In the *Matter of Howard M. Pierce and Brown Buick Co.*, 258 App. Div. 679, 17 N. Y. S. (2d) 889, Second Dep't., 1940.[1]

Enforcement of Unacknowledged Award as Common Law Award. Motion for summary judgment. The award by the Impartial Chairman was not acknowledged as required for summary enforcement under Section 1460, C. P. A. It was alleged by the appellant that an invalid statutory award could not be enforced as a common law award and that the agreement of the parties to this proceeding had contemplated only a statutory arbitration proceeding. *Held*, motion granted.[2]

> "The contract of February 18, 1938, required merely that 'all decisions, awards, findings or directions of the Impartial Chairman shall be rendered in writing' and made no mention of the necessity that such decisions, awards, &c., be acknowledged. The punctuation of the sentence indicates that the words 'as prescribed by the Arbitration Law of the State of New York' were intended to modify only the words 'his oath'. It follows that the failure of the arbitrator to acknowledge the award does not render it unenforceable as not complying with the arbitration provisions of the contract. Nor does the contract contemplate that the arbitration shall be enforced *solely* in the statutory manner prescribed by the Civil Practice Act. The provision is merely that 'any party . . . . *may* . . . . apply . . . . for the confirmation' [*italics* the court's], not that resort to a motion to confirm is mandatory. Moreover, a party to a statutory award may elect to enforce it by action thereon instead of by motion to confirm (Carmody's Practice, Volume 10, page 1249). Although the award must be acknowledged in order to entitle the successful party to summary enforcement thereof (sec. 1460, C. P. A.), no acknowledgement is required where a plenary action is brought upon the award. Section 1460 (*supra*) requires an acknowledgment only 'to entitle the

[1] The decision of the Appellate Division was affirmed without opinion by the Court of Appeals on June 11, 1940, 28 N. E. (2d) 400.

[2] For a previous decision in a proceeding by the above parties to confirm the award, cf. 4 ARB. JOURNAL 113.

award to be enforced, *as prescribed in this article*' [*italics* the court's]. The contention that plaintiff has failed to establish performance of the obligation of the alleged award imposed upon it is without merit."

Sandford Laundry, Inc., v. *Simon*, App. Div., Sup Ct., N. Y. L. J., August 1, 1940, p. 253.

SUPREME COURT, SPECIAL TERM

Arbitration by Reference to Trade Association Rules. Motion to compel arbitration. The clause relied upon reads:

> "Any claims or disputes arising in the performance of this contract shall be subject to the rules and regulations of the Rubber Trade Association of New York."

Held, motion denied. Since no rules or regulations of the Rubber Trade Association are set forth, it is not clear from the language quoted that an arbitration clause is provided for. *In re Schwabach*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., September 12, 1940, p. 600, Walter, J.

Condition Precedent to Arbitration. Motion to stay an arbitration on the ground that controversies concerning the condition or quality of merchandise had to be submitted to the Mutual Adjustment Bureau before other controversies under the contract could be arbitrated. *Held*, motion granted.

> "The merits will have to be determined in the action itself or in the arbitration before the proper tribunal. The contract shows that controversies *other* than 'condition or quality of merchandise' should be arbitrated by the American Arbitration Association. The controversy here, irrespective of the merits of it, is clearly one relating to condition or quality, and therefore the proceedings before the present arbitrators are improper."

Beckman v. Samuel Saffer & Sons, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., June 25, 1940, p. 2867, Rosenman, J.

Error of Law—Cause for Vacating an Award. Motion to remit an award to the arbitrator for error of law. *Held*, motion denied.

> "It cannot be said that the award is incomplete. The most than can properly be said is that the arbitrator may have erred in the principles of law which he applied in determining the amount of the damages. This is not ground for invalidating the award and it must stand as made (233 App. Div. 404; 13 N. Y. Supp., 2d, 309)."

Retail Clerks' International Protective Ass'n v. *Hudson & Terraplane Sales Corporation*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., June 27, 1940, p. 2902, Dineen, J.

Industrial Arbitration—Termination of Arbitration Agreement. Motion to compel arbitration (on reargument). A labor union seeks to compel a drug store owner to arbitrate a dispute concerning the existence of good cause

for the discharge of an employee. Upon reargument it was alleged that the employee, although duly licensed as a pharmacist, had failed to register as required by subdivision (d) of paragraph 3 of section 1353 of the Education Law and that in view of such violation there remained nothing to be arbitrated. *Held*, motion to compel arbitration granted. The violation of Section 1353 of the Education Law does not terminate the agreement to arbitrate.

> "Whether or not it so conclusively shows that the discharge was for good cause that the arbitration necessarily must result in favor of respondent is not, I conclude, a question which can be determined upon the motion to compel arbitration. Sufficiency of the cause of discharge is a matter which the parties have agreed to submit to arbitration."

Matter of Ayash (Haydon Drug Shop, Inc.), Sup. Ct., Spec. Term, Part I, N. Y. L. J., Sept. 28, 1940, p. 838, Walter, J.

Industrial Arbitration—Scope of Arbitration Agreement. Motion to compel arbitration. The contract between the employer and the union provided for arbitration of disputes "concerning the application or meaning of any term, condition, agreement or covenant" in the contract.

It was claimed by the union that the employer had failed and neglected to pay the salesmen the commissions due them and had failed to furnish them with statements of account, in violation of the agreement. *Held*, motion denied.

> "According to the union's own allegations, there has been a breach of the contract on the employer's part. There is nothing which needs interpretation or clarification by an arbitrator.
>
> "The dispute is one wholly outside of the contract; it is not in recognition of the contract, but in denial or repudiation of it. Accordingly, the dispute is one which must be settled by the courts and cannot be submitted to arbitration.
>
> "As was said in *Matter of Young* v. *Crescent Development Co.* (240 N. Y. 244, 248), involving a substantially similar clause: 'This clause was intended to cover controversies which do not deny but seek an interpretation of and submission to its provisions; an attitude which seeks action under the contract and not one outside of and denial of it.' "

Retail Clerks' International Protective Association v. *E. H. Goodwin Motor Car Co.*, 6 LABOR RELATIONS REPORTER, p. 784, Benvenga, J.

NEW YORK CITY COURT

Industrial Arbitration—Grievance Committee Does Not Constitute Arbitration Board. Motion to strike out, under Rule 109, C. P. A., the affirmative defense of arbitration. The plaintiff alleges that he was wrongfully discharged and demands certain payment due him under a contract between the defendant and the Newspaper Guild of New York. Defendant alleges that under the contract any dispute arising under its provisions shall be subject to review by the publisher and a Grievance Committee designated by the Guild, and

that at a conference between such Committee and defendant it was determined that plaintiff's claim was without merit. Article 5, Section 6 of the Agreement provided as follows:

> "Any dispute arising under this provision shall be subject to review by the Publisher and the Guild in accordance with the grievance committee provision of this contract."

The Grievance Committee itself is dealt with in Article 9, Section 1 of which provides:

> "A grievance committee, designated by the Guild, shall be established to settle amicably with the Publisher all grievances arising under this contract, including discharges of employees covered by this contract. The Publisher agrees to give the employee whose discharge is contemplated, two weeks' notice; said employee then to apply to the grievance committee, if he wishes, so that the committee may consult with the management in the case."

Held, motion granted.

> "The contract does not provide that the rights of the parties shall be subject to arbitration, but merely that the committee shall be established 'to settle amicably' all grievances. The contract contains no provision that any award or finding shall be made by the committee or the publisher, or both, nor is there any statement contained in the contract that the parties will abide by any award or determination of the committee and publisher. It is not always essential where there has been an agreement to arbitrate that such agreement expressly provide that the parties will abide by the award or determination, for the mere submission to arbitration carries with it the implied agreement to be bound thereby. Here, however, there is no express agreement to arbitrate, and I do not believe that the words 'settle amicably' can be construed as synonymous with arbitrate. In fact, the last sentence of Article IX indicates that the employee is not obligated to avail himself of the grievance committee, but that he may do so only if he wishes, and that if he does apply to such committee it is for the purpose of having the committee consult with the management in the case."

Kadish v. *N. Y. Evening Journal, Inc.*, City Ct., Spec. Term, Pt. I, N. Y. L. J., September 11, 1940, p. 588, Keller, J.

UNITED STATES CIRCUIT COURT OF APPEALS

Admiralty—Unilateral Repudiation of Charterparty Abrogates Arbitration Clause Contained Therein. Appeal from a decree declining jurisdiction and dismissing a libel.[1]

The libellant, a French copartnership doing business in New York, filed its libel to recover damages for breach of a contract, entered into August 17, 1939, in London, England. By this contract the owner of the Finnish Steamship "Wilja" chartered her to the libellants to proceed from New York to

[1] For decision of the lower court, *cf.* 32 Fed. Supp. 247.

Montreal, Sorel, Quebec or Three Rivers and there load grain and carry it to Cardiff, Barry, Swansea, London, Hull, Antwerp or Rotterdam, with an option of additional ports of destination, all in the British Isles. The rates of freight were specified in the charterparty.

Article 15 of the charter provided as follows: "Owner to declare laydays and cancelling dates to Louis Dreyfus & Co., London, as soon as he is in a position to do so. On receipt of such declaration, Messrs. Louis Dreyfus & Co., London, to declare whether they will execute or whether they cancel this Charterparty."

The charter also provided at Article 16 as follows: "Canadian Water Carriage Goods Act, 1936, ... and Arbitration Clause No. 39 of the Centrocon C/Party to apply to this Charterparty."

Arbitration Clause No. 39 of the Centrocon Charterparty incorporated by the foregoing reference read thus: "All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to final arbitrament of two arbitrators carrying on business in London who shall be members of the Baltime and engaged in the shipping and/or grain trades."

Libellant further alleged that its need for the steamship became so great that an agreement was made subsequently to pay approximately twice the original freight rates, provided the boat could proceed to its port of destination forthwith and that the respondent neglected and refused to cause the boat to sail immediately, in violation of its express warranty. Jurisdiction was required by the libellant by seizing the boat in the Eastern District of New York through process of foreign attachment.

Respondent moved that the court decline jurisdiction and dismiss the libel for failure to state facts sufficient to constitute a cause of action. The District Court dismissed the libel for want of jurisdiction and relegated the parties to arbitration in London. *Held*, reversed.

Said the Court: "It seems clear to us that the libellants have shown that this is not a case in which the arbitration provided for in the charterparty can be regarded as a condition upon the maintenance of the cause of action. The record indicates that there was a repudiation of the amended charterparty by the respondent, which was evidently doing everything it could to get higher freight rates on a rising market. Moreover, it had already repudiated the original charterparty of August 17, 1939, for supposed lack of consideration and had entered into the amended one of November 18, 1939, upon obtaining from the libellants an agreement to pay about double the original freight rates. Even after obtaining this great concession the respondent soon began to insist that performance was impossible because it could not load the ship at Montreal, as that port was closed for the winter, and shortly afterwards took the technical position that it would not accept libellants' suggestion that it load their cargo at New York because, under the terms of the charter, it was not required to do so. It followed this by entering into engagements with a new charterer for another European voyage. Under such circumstances it seems clear that the arbitration clause had no application to the right of the libellants to maintain the present suit. The decision of the Supreme Court in *The Atlanten*, 252 U. S. 313, 40 S. Ct. 332, 64 L. Ed. 586, and the rulings of the House of Lords in *Jureidini* v.

National British and Irish Millers Insurance Company, Ltd., (1915) A. C. 409 and *Hirji Mulji* v. *Cheong Yue Steamship Company, Ltd.*, (1926) A. C. 497, indicate that the parties should not have been relegated to London for arbitration. Before the libel was filed the charterparty had already been repudiated by the respondent, and the latter had insisted that the voyage was frustrated by the closing of the St. Lawrence River for the winter."

It follows that the arbitration clause became inapplicable after the charterparty had been repudiated by the respondent.

The Circuit Court of Appeals further pointed out that it would be a great hardship to the libellants, in view of the widespread conflict in Europe and the chaotic conditions there, if our courts were to decline jurisdiction and require the parties, even though they were citizens of foreign states, to bring suit either in Finland or England. *The Wilja. Dreyfus et al.* v. *O/Y Wipu*, 113 Fed. (2d) 646 (C. C. A. 2d, July, 1940).

UNITED STATES DISTRICT COURT

Federal Court Has Jurisdiction under the Federal Declaratory Judgment Act to Determine Scope of Arbitration Agreement Before Arbitration. Motion to dismiss a complaint praying for a decree under the Federal Declaratory Judgment Act defining the scope of an arbitration clause.

The plaintiff, hereinafter called Lehigh, and the defendant, hereinafter referred to as the Central, entered into an agreement in 1871 providing for the leasing to Central of the Lehigh & Susquehanna Railroad. This agreement was last amended in June, 1926.

Under the agreement, Lehigh was obligated to ship over the leased railroad lines a certain percentage of coal which it mined. Lehigh was to give Central an annual statement of the tonnage mined. In the event of disputes arising concerning the correctness of such statement, such controversies were to be submitted to arbitration.[1]

When the required statement for the calendar year 1938 was delivered to Central in 1939, the latter raised several objections and notified Lehigh

[1] The arbitration provision of the 1926 agreement read as follows:

> "Within two months from the receipt of such statement the party of the second part shall have the right to give written notice of demands asserted by it in respect of any alleged diversion of tonnage contrary to this Article Four during the preceding calendar year; and unless the matter be adjusted by agreement the matter may be referred to arbitration under Article Seven hereof within four months after the giving of such notice to the party of the first part, and unless such notice be given within such two months, the party of the second part shall have no right to assert thereafter any such demands in respect of such preceding calendar year. In such arbitration the arbitrators or sole arbitrator therein may hear and determine any claim that may be presented by either party with reasonable notice to the other in respect of the shipment of tonnage during said preceding calendar year."

of its election to submit the matters raised by its notice of demand to arbitration and at the same time nominated an arbitrator. Thereupon, Lehigh expressed its willingness to submit to arbitration all questions concerning the alleged diversions of tonnage during 1938, but denied Central's right to make any demands for arbitration concerning diversions of coal prior to the year 1938. Lehigh then instituted an action under the Federal Declaratory Judgment Act for declaratory relief concerning the scope of the matters which had to be submitted to arbitration under the agreement of 1926.

Central, in its motion to dismiss, alleged that the court had no jurisdiction under the Declaratory Judgment Act over arbitration proceedings between the parties and could not determine the issues to be presented to the arbitrators and the scope of the agreement.

Held, motion to dismiss denied. The Court said:

". . . . The issue thus presented by the pleadings is—Does the court have jurisdiction under the Declaratory Judgment Act with respect to an arbitration proceeding provided for in a contract and involving rights established by that contract, where an actual controversy exists as to the legal effect of certain disputed provisions of the contract?

"The fact is undisputed that there is an actual controversy between the parties, and that the controversy arises because of diametrically opposed constructions by the opposing parties of the provisions of the 1926 agreement.

"The controversy is as to the scope of the arbitration and not as to the arbitration proceeding itself. There is no disagreement that the arbitration proceeding is proper as to the year 1938; the disagreement results from the contention of Lehigh that under the 1926 agreement it is limited to 1938, while Central contends it may embrace the years 1926 to 1937, inclusive.

"It cannot be questioned that ultimately this court will be required to pass upon this controversy. There can be no question, too, that in the event the scope of the arbitration is permitted to embrace the years 1926 to 1937, inclusive, and the court eventually rules that action to be in error, that the parties will be needlessly subjected to tremendous expense and fruitless consumption of time.

". . . . In my judgment, the court has jurisdiction and the complaint sets forth a cause of action which calls for consideration and determination of the issues between the parties." *Lehigh Coal & Navigation Co.* v. *Central Railroad of New Jersey,* 32 Fed. Supp. 362 (D. C. E. D., Pa., April, 1940, Kalodner, J.).

Arbitration of Patent Disputes—Estoppel—Res Adjudicata.[1] Motion by defendant for a summary judgment on the ground that plaintiff's action for

[1] For previous decisions in this same litigation, *cf.* 256 App. Div. 1069, 12 N. Y. S. (2d) 360, 1939; affirmed 281 N. Y. 629, 22 N. E. (2d) 179, 1939; appeal dismissed 308 U. S. 522, 60 Sup. Ct. 294, 1940. The previous decisions are discussed by Anthony William Deller, in an article, "*Specific Enforcement of Agreements to Arbitrate Patent Questions,*" 17 N. Y. U. LAW QUARTERLY, 603, 1940, and, in a previous article by the same author, "*The Use of Arbitration in Patent Controversies,*" 2 ARB. JOURNAL 399, 1938.

a declaratory judgment on a question of patent infringement is *res adjudicata* because of an arbitration award between the same parties.

Under the arbitration award, plaintiff was found guilty of patent infringement and defendant was awarded $500 damages. When plaintiff refused to comply with the award, a motion for confirmation of the award was made in the New York Supreme Court. That court confirmed the award of the arbitrator. Both the Appellate Division and the Court of Appeals confirmed the lower court's decision without opinion and the United States Supreme Court dismissed the appeal for want of a substantial federal question.

In opposition to the present motion, plaintiff argues that the award is not *res adjudicata* because state courts are not courts of competent jurisdiction with respect to cases arising under the patent laws, so that one of the elements essential to *res adjudicata* is missing. *Held,* motion granted.

The Court stressed the point that while *res adjudicata* was not a good defense to this action, the motion must be granted because plaintiff was estopped from instituting this action.

With regard to the plea of *res adjudicata,* the Court said:

"I agree with the plaintiff that *res adjudicata* is not a good defense to this suit. To sustain a plea of *res adjudicata* in a suit to determine whether or not an infringement of letters patent exists, it would have to appear that there had been an adjudication by a court of competent jurisdiction upon the question of infringement. Here, however, the judgment of the State court was not a judgment in a patent case. The State court could not pass directly upon the alleged infringement of the patents and apparently went no further than to decide the respective rights of the parties under the contract of December 31, 1936, for under section 256 of the Judicial Code (28 U. S. C. A. §371) exclusive jurisdiction in patent cases is vested in the Federal courts.

"Despite the unavailability of this defense plaintiff was estopped from a collateral attack on the award. If the proceeding were taken as the enforcement by the state court of a contract between the parties, the proceedings in that court amounted to no more than a suit to enforce a contract not to infringe a patent, in which suit the findings of the arbitrator had the status of a stipulation that there was an infringement. Moreover, if in the contract action the state court passed upon the issue of infringement as a question collateral to the suit upon the contract, it had authority to do so. Under either of these two views, the elements of an estoppel are present.

"To allow now the assertion of a claim inconsistent with the arbitration award would be to the prejudice of defendant and in effect would nullify the arbitration. Under the first theory, the estoppel arises from the agreement between the parties to arbitrate and the finding of the arbitrator that there was an infringement and it is an estoppel by contract." *Cavicchi* v. *Mohawk Manufacturing Co.,* 46 U. S. PATENT QUARTERLY, 371 (D. C. S. D. N. Y., June, 1940, Goddard, J.).

SUPREME COURT OF CALIFORNIA

Arbitrations under Collective Bargaining Agreement—Effect under Arbitration Statutes Excluding Causes Pertaining to Labor. Mandamus proceedings to enforce an arbitration award.

The International Ladies' Garment Workers' Union and the David Shann Corporation had agreed in a collective bargaining agreement to submit all disputes arising thereunder to arbitration. An award rendered in accordance with the agreement was placed with the Los Angeles Superior Court, together with the Union's request for confirmation. David Shann Corporation demurred to the proceedings on the ground that the court was without jurisdiction because the award was made under a contract "pertaining to labor," which, by provisions of Section 1280 of the Code of Civil Procedure, was excepted from the arbitration statute.

The lower court upheld the manufacturer's objection and refused to confirm the award. *Held*, reversed. Section 1280 applies only to personal service contracts, not to collective bargaining agreements. Said the court:

"Our conclusion that the arbitrator's award pursuant to the terms of a voluntary collective bargaining agreement is enforceable and that it was not the legislative intent to exclude such contracts from the provisions of Section 1280 of the Code of Civil Procedure, is in harmony with legislative declaration." *International Ladies' Garment Workers' Union* v. *David Shann Corporation*, 6 LABOR RELATIONS REPORTER, 768, August 5, 1940.

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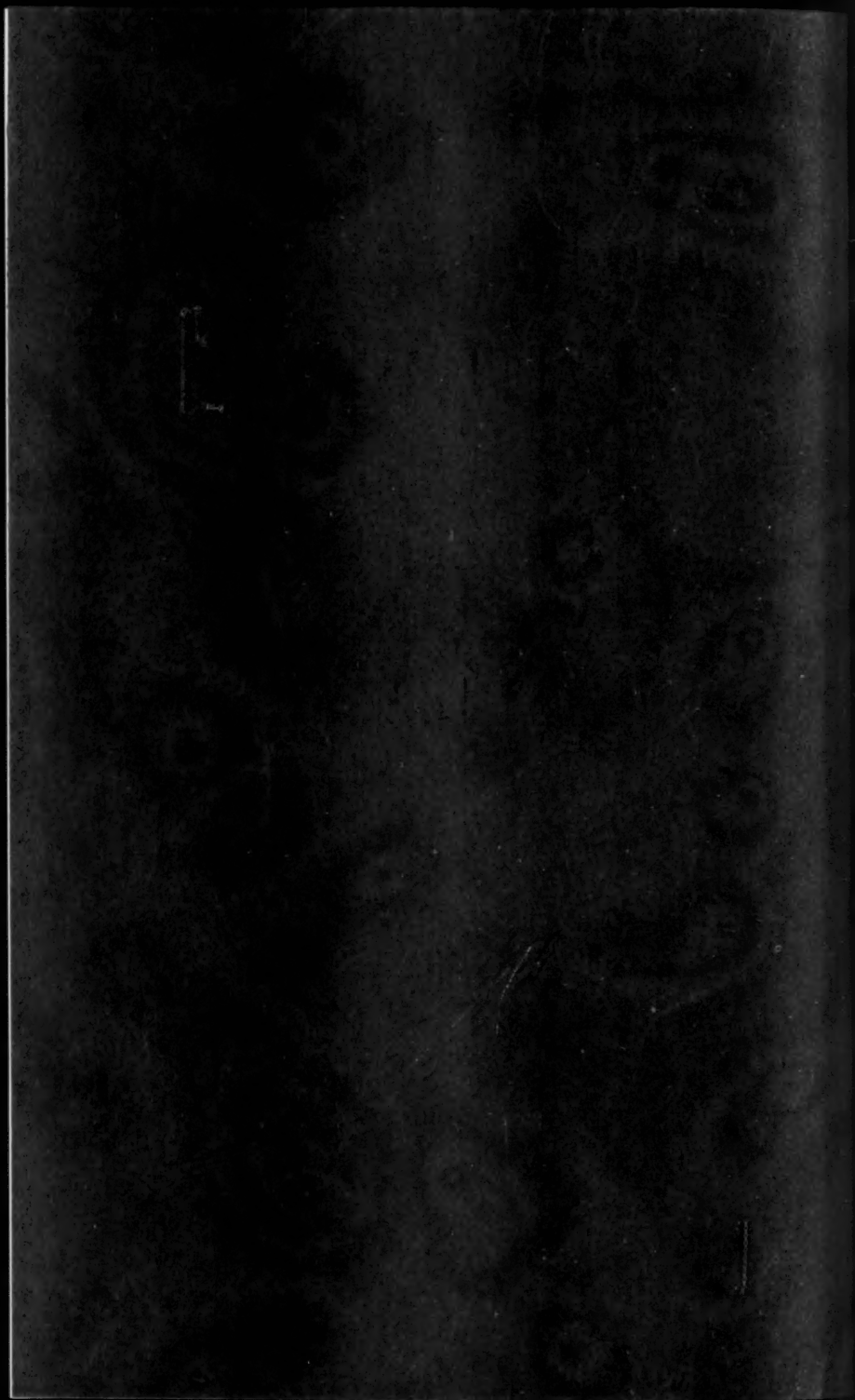

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